Appendix 5

CPE Equal Opportunity/Desegregation Highlights

Council on Postsecondary Education
Equal Opportunity/Desegregation Highlights

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Foreword

The decade of the '80s might best be remembered as the decade of desegregation planning in Kentucky postsecondary education. The Commonwealth was asked by the U.S. Office for Civil Rights to develop a voluntary desegregation plan. The state developed such a five-year plan, implemented it during the 80's, a second five year plan was developed and implemented through the mid 1990s, and yet a third plan is in place today. The process of implementation for the third five year plan is now underway.

New attention has been focused on affirmative action efforts driven by several recent rulings of the U.S. Supreme Court and Circuit Courts of Appeals, the most notable of which are the Podberesky v. Kirwan and the Hopwood v. Texas cases. Kentucky continues to focus on broad based efforts to ensure equal opportunity of access to higher education for all citizens.

With the restructuring of higher education and the expansion of the system to include technical institutions, it seemed timely and appropriate to provide the following background information on this issue. You will notice that the Fact Sheet is divided into four distinct sections: historical events, five-year desegregation plan, the 1990-95 equal opportunities plan, and 1997-2002 equal opportunities plan. The information is offered to provide context and background on this issue.

Historical Events

1886 Institution now called Kentucky State University (KSU) is founded to meet higher education needs of Kentucky's black citizens.

1890 KSU becomes a land-grant college under the 2nd Morrill Act.

1891 Kentucky's Fourth Constitution states (section 187) that "separate schools for white and colored children shall be maintained."

1904 Segregation of the races is mandated by the General Assembly.

1936 General Assembly passes legislation that Kentucky will pay tuition to out-of-state schools for African Americans wishing to pursue programs of study not offered in a Kentucky black institution.

1949 University of Kentucky is ordered by federal court to open its graduate and professional schools to African Americans.

1950 General Assembly mandates that "... Kentucky shall not erect, acquire, develop or maintain in any manner any educational institution within its borders to which Negroes will not be admitted on an equal basis with other races, nor shall any citizen of Kentucky be forced to a segregated regional institution.... The (1950) General Assembly became one of the first southern legislatures to permit black matriculation at white Kentucky colleges, provided an equal and accredited course was not available at KSCN {Kentucky State College for Negroes}." (Hardin, John A., *Onward and Upward,* Kentucky State University, 1987).

1950 University of Kentucky admits first African Americans.

1952 Kentucky State receives an independent board of regents with powers equal to the boards of all other Kentucky higher education institutions.

1954 With ruling of the U.S. Supreme Court in *Brown v. Board of Education* that segregated public schools were inherently unequal, Governor Lawrence Wetherby, and U.S. Senators Earle Clements and John Sherman Cooper assert Kentucky will abide fully by the decision. (According to *The Kentucky Encyclopedia,* no major Kentucky candidate for governor has ever called for opposition to this decision.) May 1954.

1954 Kentucky State admits its first white student (October 1954).

1964 Title VI of U.S. Civil Rights Act requires that institutions receiving federal aid that once had discriminatory aspects to them "must take affirmative action to overcome the effects of prior discrimination."

1966 "Governor Breathitt made Kentucky the first state south of the Ohio River to enact a strong Civil Rights bill." (Hardin)

1972 At the recommendation of the Council, the General Assembly makes Kentucky State a university.

1973 In Adams *v. Richardson,* federal district judge charges the federal Housing, Education and Welfare cabinet to cut off federal aid to states which discriminate against black students. (In 1977, in Adams *v.* Califano, the federal government was charged to enforce the requirements forcefully and without undue delays.)

1979 U.S. Office for Civil Rights (OCR) begins a review of Kentucky higher education, as part of its study of all states which had a dual, segregated educational system, to determine if any vestiges of the former system remain (the "Adams states").

The 5 Year Desegregation Plan 1982-87

1979-81

U.S. Office for Civil Rights (OCR) begins review of Kentucky higher education, as part of its study of all states which had a dual, segregated educational system, to determine if any vestiges of the former system remain (the "Adams states").

Office for Civil Rights (OCR) cites Kentucky as having vestiges of a dual system. The vestiges of the former system were identified as:

1. racial imbalance in undergraduate enrollments at the traditionally black institution (TBI) and the traditionally white ones (TWI).

2. racial imbalance in the staffing of these universities.

3. failure to enhance the traditionally black institution, Kentucky State University.

Governor John Y. Brown appoints a desegregation implementation committee to assist in developing the plan.

1981 In response, the Governor assigns responsibility to the Council on Higher Education to develop a systemwide response to the findings of OCR.

1982 OCR accepts the *Kentucky Higher Education Desegregation Plan 1982-87*, with 66 benchmark activities to be completed and three major commitments.

1983

KSU is given a new and unique mission in the Kentucky higher education system: the sole, liberal arts university, with the lowest student/faculty ratio, with special missions of service to state government, to its service region, to disadvantaged rural Kentuckians, and to the African American heritage of the state.

Annual progress reports are required annually beginning in 1982 through 1987. The Council submits annual plan evaluation to OCR in August 1982.

The KSU Whitney M. Young, Jr., College of Leadership Studies opens, August 1983.

1984-85

Legislature/Governor approves funding for desegregation activities at 100 percent.

Agreements are developed between OCR and the Council regarding acceptable affirmative action plans for Kentucky public universities.

The Interinsitutional Graduate Center is established at KSU with participation from University of Kentucky, University of Louisville, and Eastern Kentucky University.

First KSU graduates enter professional schools under the plan's cooperative admissions program, reserving up to 3 percent of entering spaces for KSU graduates.

1986

Legislature/Governor fund Governor's Minority Student College Preparation Program at a level of $250,000, annually. (Subsequent governors and legislatures have continued support for this early intervention program.)

OCR requested revisions in the recruitment and retention plans of EKU, MoSU, MuSU, NKU, UK, and WKU.

1987

OCR notified the Council that the five-year plan terminates on June 30, 1987. CPE and OCR officials meet in Atlanta to discuss the final review process and arrange a final round of visits to Kentucky's universities. OCR also advised that annual progress reports and completion of OCR statistical surveys were no longer necessary.

OCR visited six Kentucky universities (EKU and WKU were visited the previous fall).

The Council submits final evaluation of desegregation efforts to OCR in August 1987. (No final OCR action.)

The Council adds an eighth goal to the *1985 Strategic Plan for Higher Education in Kentucky*, to reaffirm the state's commitment to equal opportunities on its campuses in November 1987.

Governor Martha Layne Collins, by executive order dissolves the Desegregation Plan Implementation Committee, and authorizes the Council to establish the Committee on Equal Opportunities (CEO) in its place.

In Adams V. Bennett, Judge Pratt dismisses the Adams cases because of mootness and ineffectiveness of redress.

Although the Plan commitments have been completed, the General Assembly continues its funding of equal opportunities activities and enhancement of KSU's physical plant.

The Equal Opportunities Plan 1990-95

1988-90

The Council's new Committee on Equal Opportunities holds its first meeting and determines that more needs to be done to increase minority participation at all levels at Kentucky's public institutions.

The CEO develops monitoring directions and procedures.

The Council Co-sponsors Fourth National Conference on Recruitment and Retention of Minorities in Teacher Education, in Lexington, Kentucky.

CEO, with institutional input, develops and The Council approves a 5-year plan for equal opportunities in Kentucky higher education. The Plan contained six major commitments developed by each university.

1991

The Council submits an EEO performance funding request to legislature to serve as an incentive for institutional EEO efforts. (Unfunded)

The Council endorses the SREB African American Faculty Plan (a proposed cooperative effort to recruit and mentor African American graduate students and to increase the available pool of faculty).

The Council's *Strategic Plan for Postsecondary Education in Kentucky 1991-96* reconfirms the state's commitment to equal opportunities and incorporates the 1990 Plan for Equal Opportunities into the systemwide strategic plan.

1992

The Kentucky General Assembly passes legislation {(SB 398) (KRS 164.020(18))} prohibiting approval of new academic degree programs at any public institution of higher education which does not meet or make significant progress towards its commitments under the 1990 Plan for Equal Opportunities in Postsecondary Education.

1993

13 KAR 2.060 (the administrative regulation to implement SB 398) is approved.

1990 Plan for Equal Opportunities in Higher Education is amended to include the University of Kentucky Community College System; they are committed to progress on four of the six major commitments.

First evaluation of institutional eligibility for academic programs submitted to the Council in response to requirements of SB 398.

Four universities made the necessary progress to automatically submit programs for Council review and approval for calendar-year 1993. (One waiver was granted by CEO/CHE.)

WKU requests and is granted a waiver of the requirements of SB 398 and is eligible to submit new academic degree programs for review and approval by the Council during calendar year 1994.

1994-95

Two universities and 14 community colleges made the necessary progress to automatically submit programs for Council review and approval in calendar year 1994. (One waiver was granted by CEO/CHE.)

EKU requests and is granted a waiver of the requirements of SB 398 and is eligible to submit new academic degree programs for review and approval by the Council during calendar year 1995.

Three universities and 13 community colleges made the necessary progress to automatically submit programs for Council review and approval in calendar year 1995.

The 1990 Plan for Equal Opportunities in Higher Education ended in September 1995.

The Council extends the 1990 Plan an additional fifteen months to allow development of a new plan.

1996-97

Five universities and 10 community colleges made the necessary progress to automatically submit programs for Council review and approval in calendar year 1996. (Two waivers were granted by CEO/CHE.)

UK requests and is granted a waiver of the requirements of SB 398 and is eligible to submit new academic degree programs for review and approval by the Council during calendar year 1996.

KSU exercises the option to submit new programs under the quantitative waiver provisions of SB 398 (13 KAR 2:060) during calendar year 1996.

Two universities and seven community colleges made the necessary progress to automatically submit programs for Council review and approval in calendar year 1997. (Four waivers were granted by CEO/CPE.)

NKU exercises the option to submit new programs under the quantitative waiver provisions of SB 398 (13 KAR 2:060) during calendar year 1997.

Three community colleges (Hazard CC, Southeast CC, and Owensboro CC) exercise the option to submit new programs under the quantitative waiver provisions of SB 398 (13 KAR 2:060) during calendar year 1997.

The 1997-2002 Kentucky Plan for Equal Opportunities in Postsecondary Education was adopted by the CPE at the July 1997 meeting.

Governor Paul E. Patton by Executive Order 97-1072 established the Committee on Equal Opportunities in postsecondary education and dissolved the former Committee on Equal Opportunities established under Executive Order 87-971.

A revised administrative regulation for implementation of the objectives of the new Kentucky Plan is developed.

Fall 1997 the Committee on Equal Opportunities will conduct campus visits to two universities and several community colleges.

Fall 1997 and Spring 1998 the Council's Committee on Equal Opportunities will review the need/process for incorporating the Kentucky TECH System into the new Kentucky Plan.

GOAL OF THE KENTUCKY PLAN

To provide equal educational opportunities for all Kentuckians, regardless of race, by striving to increase minority student enrollment at the traditionally white institutions; to increase the number of minorities employed at the traditionally white institutions especially in administrative and faculty positions; and to continue to enhance the current status of the commonwealth's historically black institution in its important role in the postsecondary education system as identified in *The Kentucky Plan for Equal Opportunities in Postsecondary Education 1997-2002* (the new Kentucky Plan).

THE COMMITTEE ON EQUAL OPPORTUNITIES

The Committee on Equal Opportunities (CEO) is responsible for overseeing the implementation of the general commitments, specific objectives (goals), annual evaluations of institutional progress, assessing campus climate through campus visits, and assessing institutional compliance with the requirements of Senate Bill (SB) 398 {KRS 164.020(18)}. The primary goal is to: provide equal educational opportunities for all Kentuckians, regardless of race, by striving to increase minority student enrollment at the traditionally white institutions; increase the number of minorities employed at the traditionally white institutions especially in administrative and faculty positions; and continue to enhance the current status of the Commonwealth's historically black institution.

THE COUNCIL ON POSTSECONDARY EDUCATION

The Council on Postsecondary Education (CPE) serves as the coordinating agency for postsecondary education in Kentucky. In 1981, the Governor designated the CPE as the state agency to develop, implement, and monitor a statewide postsecondary education desegregation plan. CPE and its Committee on Equal Opportunities (CEO) are responsible for overseeing institutional compliance with the requirements of Senate Bill (SB) 398 {KRS 164.020(18)} implemented through administrative regulation (13 KAR 2:060).

CHE
KENTUCKY COUNCIL
ON HIGHER EDUCATION

Gary S. Cox
Executive Director

MEMORANDUM

TO: Charles Whitehead

FROM: Gary S. Cox

DATE: August 2, 1996

SUBJECT: Proposed Objectives for Revised Plan

Following our discussions with the university presidents and additional data analysis based on the presidents' comments and concerns, the work group met on Tuesday, July 30. The work group made significant progress toward the development of objectives for the revised plan. I believe the discussion with the university presidents is playing a major role in helping the work group make progress toward the development of a new plan. However, there still are several issues to be resolved by the next work group meeting on August 21. CHE staff will continue working with members of the work group to resolve those issues in a timely manner. My understanding of the agreement/consensus issues follows:

Recruitment: The work group agreed that the recruitment objectives for the revised KY Plan should consist of a statewide objective coupled with individual institution objectives. Evaluation of progress should be a combination of achieving the statewide objective plus progress being made on each institution's objective. The objectives as provided in the agenda for the July 30 meeting will be used.

It was agreed that the development of institutional objectives could best be achieved through allocation of the high school graduate pool based on the 1995 market area analysis. Consensus on this point is based on the results of analyses of alternative approaches. In most instances the alternative approaches produced objectives which were greater than those using the agreed upon approach. The distribution of high school graduates based on the market area analysis approach was more realistic and produces objectives that are reasonable and obtainable. The recommended approach is consistent with the methodology used in the current plan.

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Retention: The work group agreed with the suggested approach which calls for the measurement of retention of first-year Kentucky resident students from fall semester to fall semester. This approach would eliminate the separate category for retention of all Kentucky resident students. The work group also agreed with the presidents' idea of building some type of incentive in the funding formula -- they understand that these issues must be dealt with during the review of the funding model. The evaluation piece would focus on closing the gap between the retention rate for white students and the retention rate for African-American students. Retention beyond the first year would be reflected only in the Baccalaureate Degrees awarded category, not in a separate category as currently is the case.

The work group felt that measuring retention from fall to fall would be a stronger and more appropriate reflection of what is happening to the students. The approach does not change the current process significantly, except to extend the time period over which the evaluation takes place. In my opinion, the result initially will be a lower retention rate across the board for all students (African American and white) and a minor increase in the gap between the retention rates for African American and white students.

Scholarships and Admissions: There was general agreement that for existing programs using race as a factor in the selection process the admissions and scholarship policies need to continue if institutions are to achieve the objectives set forth in the revised plan. It also was agreed that the existing policies need to be reviewed in light of recent federal court decisions, but that this is an institutional issue. We agreed that institutions should establish committees to begin immediately to review the admissions and scholarship policies to identify ways to limit any perceived exposure. The institutions will continue working with Dennis Taulbee on the policy revisions.

Employment Objectives: The work group agreed that the process used in 1980, 1990, and 1992 (when the community colleges were included in the plan) was the proper mechanism to be used for establishing objectives for the seven employment categories. The work group agreed to use the Department of Labor "eight factor" analysis to establish the objectives. The work group also agreed to provide their proposed objectives for the top three employment categories to CHE staff by Friday, August 16, to be shared with the work group. This approach is consistent with the current methodology.

Time Frame for Evaluation/Publication: The work group agreed to a biennial publication of the evaluation report for the revised plan instead of an annual report. This approach will coordinate publication of the EEO report with other CHE publications. Members of the work group agree that evaluation of progress for purposes of establishing eligibility for requesting new academic programs (SB 398) should continue to be completed and reviewed by the CEO annually.

Degrees Awarded: There was consensus among the work group that CHE staff should look at an alternative for developing objectives related to degrees awarded. The desire is to have the proportion of degrees awarded to African-American students be equal to the proportion of degrees awarded to white students. CHE staff needs to do additional analysis to determine if this approach will work. We will present the results of the staff analysis and proposed institutional objectives at the August 21 meeting of the work group. The expectation for this objective is the same as in the current plan. However, the methodology for developing the objective would be different.

Graduate Student Enrollment: CHE staff discussed using a university mission oriented approach for this objective. The institutions were generally favorable toward this initiative. However, since we were unable to provide a specific objective, they basically reserved judgment until more information could be provided. They were supportive of the idea of having objectives that focus on the different institutional mission areas (i.e., doctoral and masters) but somewhat apprehensive about how it would work. This would be different from the objective as outlined in the current plan.

The work group discussed use of the missions-oriented objective as a means of addressing the preparation of more African-Americans to meet the need of primary and secondary education for teachers, counselors, and administrators. Also discussed was the need for more African-Americans with Ph. D.'s to meet the need of Kentucky institutions. However, the approach in these areas still needs to be worked out.

Baseline Year for Revised Plan: CHE staff suggested and the work group agreed that the baseline year for the revised plan should be fall 1995. Fall 1995 should be used because the data used for analysis for the revised plan is fall 1995. This is consistent with the current methodology.

Public Hearings: The work group is aware of the dates established for the public hearings for the revision of the plan. The format of the hearing is to receive information from the public. A copy of the plan will be at each hearing site for review by the public. Each institution is encouraged to be at the public hearings and participate. Each hearing will last approximately 2.5 hours.

In summary, I believe the work group has made significant progress. However, there are still issues to be resolved. I expect those issues to be dealt with at the August 21 meeting of the work group.

cc: Jim Miller
CEO Members
University Presidents
Sherron Jackson
Dennis Taulbee

CHE
KENTUCKY COUNCIL
ON HIGHER EDUCATION

Gary S. Cox
Executive Director

MEMORANDUM

TO: University Presidents

FROM: Gary S. Cox

DATE: June 4, 1996

SUBJECT: *Kentucky Plan for Equal Opportunities in Higher Education*

I wanted to take this opportunity to share with you the status of the review and revisions of the *Kentucky Plan for Equal Opportunities in Higher Education (Kentucky Plan)*. The process began with a retreat of the Council on Higher Education Committee on Equal Opportunities (CEO) on April 29 at which Mr. Michael Goldstein provided an overview of legal issues and recent federal court cases. Representatives from each institution attended the retreat; I urge you to discuss the retreat and keep abreast of the work group discussions. Since the retreat your representatives, the Desegregation Plan Advisory Work Group (DPAWG), have met once. The process calls for the DPAWG to develop a draft plan which the CEO and CHE will review and accept or alter and adopt at the November 1996 meeting. The next steps in the review process will be:

- To identify issues and key indicators and build consensus on the method of addressing them in the new plan
- To review and revise language for special scholarships and admissions policies
- To develop goals and objectives in the new plan
- To review the proposed revisions by institutions
- To hold CEO public hearings on proposed revised plan
- To present draft final plan to CEO for review and recommendation to CHE
- To adopt revised plan at November CHE meeting

A more detailed description of the process and calendar can be found on pages C103 - C107 of the May 20, 1996 CHE agenda booklet. Based on the discussion at the April 29 retreat and the adopted principles, there is general agreement that the plan revision will move forward based on the CEO directives that: a) the plan will be based on the need to ensure equal opportunity to higher education for all Kentuckians; b) minority preference programs should continue to be a part of the plan and should play an important and continuing, albeit more tightly defined, role; c) we need to be mindful of recent court decisions while

recognizing the unsettled nature of federal court rulings; d) Kentucky should define its own solution to the EEO problem; and e) each institution should review the language of minority preferences in admissions and financial aid. The DPAWG has identified issues and key indicators and is moving forward to review the language for special scholarships and admissions policies in light of recent court decisions.

There needs to be a common solution for the system of higher education since our strength is in having a unified approach, particularly if there is a court challenge to the new *Kentucky Plan*. It is our expectation that the DPAWG will make a recommendation on the wording of institutional policies for admissions and financial aid to be included in the new plan. However, we recognize that decisions on specific admissions and financial aid policies remain with the institution. At or around the end of September the DPAWG and CHE staff will present a draft *Kentucky Plan* to the CEO for review and action. Following its review the CEO will recommend a new *Kentucky Plan* to the full CHE for review and action at the November 1996 meeting.

I want to reiterate several important premises from earlier discussions -- the new plan should be more meaningful, have understandable indicators and credible goals, be straightforward, easier to understand, and provide valuable information to the public. The new plan should be one that we and others can easily explain.

Please let me know if you have any comments or concerns regarding the process at our meeting on Wednesday, June 5. I look forward to discussing this and other issues with you on Wednesday.

GSC/plb

cc: Jim Miller
Charles Whitehead
Hilma Prather
DPAWG
Sherron Jackson
Dennis Taulbee

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July 17, 1989

Dr. Gary S. Cox
Executive Director
Commonwealth of Kentucky
Council on Higher Education
1050 U.S. 127 Bypass
Frankfort, Kentucky 40601

Dear Gary:

As we discussed, the U.S. Court of Appeals for the District of Columbia Circuit issued a significant decision on July 7 in the longstanding Adams case litigation. The Court of Appeals reversed Judge Pratt's December 1987 decision, which had dismissed the case, and thus the Adams case is revived. The decision came in the consolidated case styled Women's Equity Action League v. Cavazos, Civil Action No. 88-5065, Order (D.C. Cir. July 7, 1989).

As you may recall, Judge Pratt dismissed the Adams case on grounds of plaintiffs' lack of continued standing, mootness, and ineffectiveness of remedies sought by the parties. Adams v. Bennett, Civil Action No. 3095-70, Memorandum Opinion and Order (D.D.C. Dec. 11, 1987). Since that decision, the district court has not exercised any jurisdiction over the Department of Education. The Adams plaintiffs appealed Pratt's decision in early 1988.

In reversing Pratt's dismissal, the Court of Appeals found that the Adams plaintiffs do in fact continue to have standing to maintain this case. Distinguishing Pratt's reliance on other cases involving lack of standing, the Court of Appeals held that those cases did not rule out standing for the Adams plaintiffs. According to the Court, the plaintiffs in this case are clearly the intended beneficiaries of the statutes under which they sued, and plaintiffs need not show "sure gain" should they win in court, but rather only need demonstrate an enhanced probability of gain.

Although it resolved the standing issue, the Court of Appeals found that there are several important issues that still need to be decided. Rather than remand those issues to Judge Pratt to decide, the Court of Appeals announced that it

would itself review and decide the issues. Accordingly, the Court directed that the parties brief the following issues:

1) Do the statutes plaintiffs invoke authorize an action directly against the federal funding/compliance monitoring agency?

2) Does the district court have authority to impose procedural or enforcement requirements (timeframes, compliance monitoring, and reporting) supplementing those set out in the governing legislation?

3) Are current government officer defendants bound by provisions set out in a consent decree negotiated and agreed upon by prior administrations? If they are, what must they show if they wish to be released from, or obtain modification of, those provisions?

4) Are the states whose desegregation plans, reports, and compliance that plaintiffs seek to review considered to be persons properly regarded as "indispensable" within the meaning of federal law?

In essence, the Court of Appeals has ruled that the Adams plaintiffs continue to have standing to sue, but has deferred action on the substantive issues of the case. We would expect that the parties will submit briefs addressing these issues in the fall, with oral argument scheduled thereafter. A decision by the Court of Appeals on these issues, which are important and difficult, would likely not occur until next spring or summer, at the earliest. The Court's July 7 decision on standing gives little indication on how it will rule on the substantive issues. For the time being at least, the Adams case continues.

Please do not hesitate to let us know if we can provide any further information at this time.

Sincerely,

Blain B. Butner

Blain B. Butner

BBB/ptp

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WRITER'S DIRECT DIAL NO

July 22, 1988

Dr. Gary S. Cox
Executive Director
Commonwealth of Kentucky
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1050 U.S. 127 Bypass
Frankfort, Kentucky 40601

Dear Gary:

In preparation for the first meeting of the Council's Committee on Equal Opportunities, you have asked us to provide you with a summary of the present status of the Commonwealth's Higher Education Desegregation Plan, which was developed in response to a 1981 finding of the U.S. Department of Education's Office for Civil Rights ("OCR"), as well as to analyze the current state of the law under which the Commonwealth must function, the approaches taken by other similarly situated states, and, finally, the options and alternatives now available to the Commonwealth with regard to compliance with Federal civil rights law.

As special counsel to the Commonwealth for the past eight years, we have assisted the Council on Higher Education in the development of the Plan and in its implementation over the ensuing period. We have also actively monitored the legal action underlying the Department of Education's directives to Kentucky and other states, now called Adams v. Bennett, which has resided in the federal district court in Washington, D.C. for the last seventeen years, and which directly impacts upon the Commonwealth's obligations in this area. In addition, in our capacity as counsel to the State Higher Education Executive Officers Association as well as on

behalf of the Commonwealth, we have monitored the status of other states that were also cited by the Department of Education for violations of the Civil Rights Act of 1964, most of whom have similarly implemented statewide higher education desegregation plans. We are therefore well prepared to provide you with the requested analysis.

We have ordered our response to provide you and your Committee with a logical progression of information. Thus, first, we have described the legal obligations that are imposed upon all states under Title VI of the Civil Rights Act of 1964. Second, we address the current status of the Kentucky Plan. Third, we provide comparative information on other states' progress in meeting their own higher education desegregation commitments. Finally, we offer our advice as to the alternative courses of conduct available to the Commonwealth at this juncture with regard to its oversight and management of the state's public higher education system.

I. Legal Obligations Under Title VI

Kentucky, like all other recipients of federal funding, is obligated to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. This law was enacted in the aftermath of the landmark case of Brown v. Board of Education, 347 U.S. 483 (1954), which invalidated de jure (that is, legally established) racially dual school systems.

The key provision of Title VI is found in Section 601 of the Act, which provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

42 U.S.C. § 2000d. The Act provided for enforcement by directing "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity" to promulgate rules enforcing Title VI and to discontinue Federal financial assistance to recipients violating the rules. 42 U.S.C. § 2000d-1. Within the Department of Education, the Office for Civil Rights was delegated responsibility to promulgate and enforce such regulations, which apply to all programs that receive Federal

financial assistance through the Department. See 34 C.F.R. §§ 100.1-100.13 (1987).

Among OCR's regulations is one of particular applicability here. Section 100.3 provides:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

Id. § 100.3(b)(6)(i) (emphasis supplied). This regulation codifies the Supreme Court's holding in Green v. County School Board of New Kent County, 391 U.S. 430, 437-38, (1968). Because until the very early 1950's Kentucky had a legally-mandated segregated public university system, there is no doubt of the applicability of this provision.

However, the law was -- and remains -- unclear as to precisely what sort of actions are required by a state to eliminate what has come to be called the "remnants" of a previously segregated system in the higher education context. The considerable litigation involving elementary and secondary education provides some helpful, but not particularly comparable, guidance. "Affirmative action" in the context of public primary and secondary schools has consisted of measures such as establishing quotas and redistricting school districts to establish a ratio of white students to minorities comparable with the ratio in the community at large. See, e.g., Green, supra, 391 U.S. 430. Actions must be undertaken to ensure that minority students will have a "meaningful opportunity to participate in the educational program." Lau v. Nichols, 414 U.S. 563, 568 (1974). Additionally, at the primary and secondary school levels, "affirmative action" means more than simply allowing students to choose between two schools, when one of the schools was a traditionally black institution and the other a traditionally white institution; specific actions to remedy the maldistribution of the previous system are required. See Georgia v. Mitchell, 450 F.2d 1317, 1320 (D.C. Cir. 1971).

The law also does not require discriminatory intent to be present for OCR to be able to find a violation of its requirements. In a later case, the Court upheld OCR's regulations that invalidated educational programs that produced discriminatory effects although there was no indication of purposeful discrimination. Guardians

Association v. Civil Service Commission of City of New York, 463 U.S. 582 (1983); see 34 C.F.R. § 100.3(b)(2).

But clearly higher education is structurally different from the lower grades. The most obvious distinction lies in the fact that there are no fixed enrollment districts: with only limited restrictions at the community college level and differences in tuition between state residents and non-residents, prospective students are free to seek to enroll at any institution of their choice. The question of the racial composition of the student body then becomes one of admissions and retention policy, not definition of attendance zones. The Supreme Court has grappled with issues relating to admissions in institutions of higher education, holding that Title VI "proscribe[s] only those racial classifications that . . . violate the Equal Protection Clause." Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978). In that case, the Court also found that the considerations surrounding the desegregation of an institution of higher education are different from those surrounding the desegregation of a public primary or secondary school. See id. at 300 n.39. Bakke determined the upper limits of "affirmative action," holding that flatly setting aside places for admission of minority or disadvantaged students was unconstitutional because it "involve[d] the use of an explicit racial classification never before countenanced by this Court." Id. at 319. Thus, while the Supreme Court has given some guidance, it has not enunciated clear standards as to what constitutes a violation of Title VI and what constitutes compliance with Title VI in the context of institutions of higher education. See Guardians Association, 463 U.S. at 617 & n.2.

The U.S. Court of Appeals for the Sixth Circuit, whose jurisdiction includes Kentucky, has dealt with desegregation in the higher education context in the case of Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979). That court has held that a federal district court was justified in directing the state of Tennessee to take the ultimate step of merging a traditionally white four-year college (University of Tennessee at Nashville) with a traditionally black institution (Tennessee State University), when other methods had failed to effectively desegregate the two colleges. Thus, even though the Court also approved less drastic state-wide measures adopted by Tennessee to desegregate its higher education system beyond the confines of Nashville, including recruitment drives by predominantly

white colleges at predominantly black high schools, providing additional financial aid to black students, intensive recruitment of black faculty members to teach at the predominantly white institutions, and similar measures to be taken at the traditionally black institutions to recruit more white students, the federal court in the end compelled Tennessee to merge the two state universities in Nashville because they still demonstrated the lingering effects of discrimination. The Geier case demonstrates that radical remedies could be imposed to achieve desegregation in the higher education context, just as they have been at the primary and secondary levels.

Perhaps the most important, and certainly the longest running, case involving Title VI compliance at the higher education level is the now-legendary Adams case, which was initiated in the federal district court in Washington, D.C. in 1970 as Adams v. Richardson; see 356 F. Supp. 92 (D.D.C. 1973). The plaintiffs in the Adams case were primarily minority students and their parents who brought an action against the Department of Health, Education and Welfare (the predecessor to the Department of Education) to compel the Department to enforce Title VI. They alleged that the Department was disbursing federal funds to states that were continuing to use those funds in a discriminatory manner in their public colleges and universities. In 1973, the federal district court in the Adams case agreed that HEW was not adequately enforcing Title VI, specifically that it was continuing to disburse federal funds to states that had failed to submit and comply with plans to desegregate their public university systems; consequently, the court ordered HEW to immediately commence proceedings to cut off federal financial assistance to these states. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973). On appeal, the U.S. Court of Appeals affirmed the district court's judgment, but modified it to allow the states 120 days to submit acceptable plans. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

Subsequently, HEW dutifully accepted plans from several states and began to monitor the states' compliance. But the Adams plaintiffs then challenged both the adequacy of these plans and the extent of HEW's monitoring, and in 1977 the district court found that HEW's efforts continued to be inadequate. Adams v. Califano, Civil Action No. 3095-70, Second Supplemental Order (D.D.C. Apr. 1, 1977). Specifically, the court ruled that the previously accepted state plans were inadequate, and that as implemented the plans had failed to achieve significant progress toward

desegregation. The court then ordered HEW to develop and issue specific criteria to guide the states in preparing revised plans. The criteria, which subsequently became the guideposts for all future higher education actions, were promulgated in February 1978. See 43 Fed. Reg. 6658 (Feb. 15, 1978).

In the late 1970's and early 1980's, HEW and its successor Department of Education negotiated higher education desegregation plans with most of the originally cited states as well as additional states (such as Kentucky) which it found to be out of compliance with Title VI. The Adams plaintiffs continued to intensively monitor this activity and on several occasions sought additional action by the District Court to ensure compliance with the original orders. (The Adams cases also expanded to include elementary and secondary education and claims involving sex and handicapped discrimination, but that is not germane here.)

The District Court continued to retain jurisdiction over the Department until December 1987 when, in a very important and altogether unanticipated action, Judge Pratt dismissed the Adams case on grounds of mootness and ineffectiveness of remedies sought by the parties. Adams v. Bennett, Civil Action No. 3095-70, Memorandum Opinion and Order (D.D.C. Dec. 11, 1987). Specifically, and perhaps most significant in the history of this litigation, Judge Pratt found that the injury of which the plaintiffs complained was not redressible by cutting off federal funds, noting that such an action would likely be more devastating to the traditionally black institutions than to their predominantly white brethren. In effect, Judge Pratt has repudiated the entire theory of using an absolute cutoff of Federal support as a weapon to effectuate structural change in higher education, admitting that the problems are so complex and the solutions so indefinite as to defy the broad-sword approach he himself fashioned a decade earlier.

The plaintiffs have appealed the dismissal of the case to the U.S. Court of Appeals, where a decision is not expected for many months. Based on earlier actions by the appellate court, it is likely that Judge Pratt's order will be sustained. But, since no one would have predicted that Judge Pratt would have dismissed the Adams case in the first place -- certainly not on the grounds of ineffectiveness of remedy -- it is unwise to go too far in predicting what any other court might do. If the Adams case is not reinstated by the Court of Appeals, one of the most effective mechanisms

for persons to affect the conduct of statewide higher education systems will be removed. Instead, an individual would have to file a separate complaint with the Department of Education or file an individual lawsuit if he or she had a Title VI complaint against a state institution. System-wide complaints would become far more difficult to sustain, absent a clear pattern of discriminatory treatment.

A final, recent legal development that may directly affect Title VI claims in the future is the enactment of the Civil Rights Restoration Act of 1987, which Congress passed in March of this year over President Reagan's veto. Pub. L. No. 100-259. The most important provision of this Act is the clarification that "program or activity" at an entity receiving federal funds means all the operations of that entity, so that if only one program or activity of the institution receives federal funding or if discrimination is found in only one program or activity of the institution, every program operated by the institution would be subject to the provisions of Title VI and subject to the requirements for remedial action. As a result, a finding of discrimination in any program of a university could trigger institution-wide sanctions. The effect of this law is to restore the status quo before the Supreme Court decision in Grove City College v. Bell, 465 U.S. 555 (1984), which had limited Title VI sanctions to the specific program or activity receiving Federal funds.

In summary, the legal obligation imposed upon the Commonwealth, the Council and the state's public institutions of higher education remains compliance with Title VI of the Civil Rights Act of 1964; that is, not to discriminate in the provision of or access to educational services. The Civil Rights Restoration Act of 1987 makes it clear that once an institution receives Federal funds for any program or activity the entirety of its operations must comply with Title VI. However, the dismissal of the Adams case changes the framework within which compliance must be sought. Arguably, the kinds of plans previously required by OCR may no longer be enforceable. Instead, the Department of Education may have to deal with incidents of discrimination on a case-by-case basis, applying sanctions with a scalpel instead of an ax. This evolution of the law is yet to be played out, and subsequent cases will set the new, post-Adams parameters of acceptable conduct. Clearly, any form of discrimination by a public institution based on race is impermissible. But the degree to which passive "remnants" of

long past discrimination can be remedied by Federal fiat remains to be seen.

II. Current Status of Kentucky's Higher Education Desegregation Plan

In 1979, the U.S. Department of Health, Education and Welfare initiated a statewide review of public higher education in Kentucky under the authority of Title VI of the Civil Rights Act of 1964. During 1979 and into 1980, OCR collected data on all of Kentucky's public institutions of higher education and conducted on-site reviews at several campuses.

On January 15, 1981, just before the end of the Carter Administration, OCR informed then-Governor John Y. Brown, Jr. that it had determined that Kentucky had failed to eliminate the vestiges of its former de jure racially dual system of public higher education and, therefore, that the Commonwealth was in violation of Title VI of the Civil Rights Act. OCR specifically found vestiges of discrimination in three areas: (1) racial identifiability of undergraduate student enrollments, both at the traditionally white institutions and at the traditionally black institution, Kentucky State University, (2) racial identifiability of faculty and staff at the traditionally white and traditionally black institutions, and (3) failure to enhance Kentucky State University. OCR requested that the Governor submit, within sixty days, a statewide desegregation plan that would "fully desegregate the Kentucky system of higher education."

Governor Brown designated the Council on Higher Education as the agency to review and respond to the OCR letter. Under the Council's aegis, the findings in the OCR letter were carefully evaluated. As a result of this evaluation, very early in the process the State informed OCR that it did not believe that the problems cited were as OCR had described them. The Commonwealth noted that: (1) over ninety percent of all black Kentuckians going to one of the state's colleges or universities were already attending traditionally white institutions, (2) four traditionally white institutions and one community college enrolled more black Kentucky college students than Kentucky State University, (3) black high school graduates in Kentucky enrolled in college at a higher rate than did white high school graduates, (4) each public university, including Kentucky State University, had developed well-defined, non-

racial missions, and (5) Kentucky State University had received greater per-student financial support from the state during the preceding decade than any other Kentucky university.

Nonetheless, the Council recommended and the Governor agreed that, notwithstanding the belief that the state was not in violation of Title VI, the Commonwealth would voluntarily comply with OCR's request for the development and implementation of a statewide plan. The Council then entered into extended negotiations with OCR regarding the specific content of the Plan, culminating in submission to OCR in January, 1982 of a carefully drafted five-year Plan.

On January 29, 1982, OCR provisionally accepted the Commonwealth's Plan, but sought greater specificity in certain areas. Upon agreement with OCR, Kentucky immediately began to implement the Plan. In June 1983, OCR gave final approval to the Plan. The Commonwealth and OCR subsequently agreed that the five-year period would continue through June 1987, the end of the 1986-87 academic year.

Kentucky's Plan contained a series of commitments, benchmarks and timetables divided into three major areas keyed to OCR's findings:

1. desegregation of student enrollment;

2. desegregation of faculty, staff and governing boards; and

3. enhancement of Kentucky State University.

The Plan also called upon the Governor to appoint a citizens' advisory committee, then called the Implementation Committee, to monitor the status of Plan implementation and to make recommendations to the Council. The President and governing board of each state institution formally pledged their support to carrying out the Plan commitments.

During the course of the next five years, each of the state's public universities, the Council on Higher Education and other offices of state government devoted substantial time and resources to implementing the various elements of the state Plan. In August of each year, the Commonwealth submitted an annual report to OCR describing progress made in carrying out Plan objectives and during the

life of the Plan the Implementation Committee met regularly to advise the Council and make recommendations on specific aspects of the Plan.

On June 30, 1987, the five-year Plan expired. As part of the closeout process, OCR again conducted site visits at various of the state's institutions. OCR also requested that the state submit a final progress report on the implementation of the Plan over the five-year period, so that OCR could assess the state's success in fulfilling its commitments. The Council submitted its final closeout report in April 1987.

Since the expiration of the Plan, OCR has informed the Commonwealth that it has been reviewing all of the data that had been submitted to it, and has continued to request additional information from the state. However, as of this date, OCR has not indicated whether in its view Kentucky has fulfilled its Plan commitments or whether the Commonwealth is in compliance with Title VI.

There are three possible determinations that OCR could make. First, it could determine that Kentucky has fulfilled its commitments under the State Plan and that the state is therefore in compliance with Title VI. Second, OCR could determine that the state has fulfilled <u>most</u> of its Plan commitments, but that some specific actions still need to be taken before OCR could find that Kentucky was in full compliance with Title VI. Third, OCR could determine that the state had failed to fulfill its Plan commitments to such an extent that the state should be required to continue to operate under its Plan for an additional period of time, with or without modifications to the original Plan.

Of the ten states whose plans expired before Kentucky, OCR made the first determination as to four states, and the second determination as to six states. No state was found materially out of compliance. A more detailed description of the activities and status of other states is provided in Part III of this letter.

We are informed by OCR that they expect to issue their draft factual report on Kentucky before the end of August. They tentatively plan to follow the same procedures with Kentucky as they used with the first ten states. The draft factual report would be publicly issued with an invitation for comment by the state and interested members of the public. For the first ten states, the public comment

period was sixty days. After receiving and reviewing any comments that were submitted, OCR would make its decision regarding the state's compliance. In the case of the first ten states, these decisions were announced approximately eight months after the close of the public comment period. If the same timetable were adhered to for Kentucky, the state could expect a decision from OCR in approximately June 1989, assuming the draft factual summary were released at the end of August. However, since Kentucky is the only state presently at this stage of the review process, and the first ten states were processed in parallel, it is likely that the process for Kentucky could be shortened and that a final decision could be made by OCR by the end of calendar 1988.

III. Comparative Information on Other States' Progress

As a result of the Adams litigation, eighteen states have been cited by the Department of Education for having failed to eliminate the vestiges of a formerly de jure racially dual system of public higher education. The states, in addition to Kentucky, are Alabama, Arkansas, Delaware, Florida, Georgia, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia and West Virginia. OCR requested each of these states to develop and implement a five-year higher education desegregation plan.

Those states that complied with OCR's request are at various stages of implementing their plans. However, five states (Alabama, Louisiana, Mississippi, North Carolina and Ohio) either refused to submit a plan or submitted plans that were not acceptable to OCR. In the cases of Alabama, Louisiana and Mississippi, OCR referred the matters to the Department of Justice, which instituted lawsuits against each of the states, as a precondition to terminating federal financial aid to those states. Those proceedings are still under way. OCR also referred the state of Ohio to the Department of Justice, but after years of correspondence between the state and the Department of Justice, no action has been initiated against the state. In the case of North Carolina, OCR chose to institute administrative proceedings against the state. Subsequently, a federal court approved a statewide plan, which has been implemented by the state. Finally, the state of Tennessee was never cited by the Department of Education, because legal proceedings had already been initiated against the state by various citizens

groups. The court in Tennessee approved a statewide plan similar to those adopted by the Adams states.

Enclosed as Attachment 1 to this letter is a more detailed description of the status of desegregation efforts by each of these states.

At this juncture, it may be most beneficial to focus on the ten states whose state plans expired before Kentucky's plan, and for whom OCR has recently issued decisions as to compliance or noncompliance. The ten states each had plans that expired in December 1985 or June 1986. OCR reviewed all of these ten states simultaneously, and in February 1988 issued its decisions on these states. OCR found that four states (Arkansas, South Carolina, West Virginia, and the community college system in North Carolina) had substantially implemented the measures contained in their state plans, were in full compliance with Title VI and that no further actions were needed.

With regard to the remaining six states (Delaware, Florida, Georgia, Missouri, Oklahoma and Virginia), OCR determined that the states had not yet implemented all provisions of their plans and enumerated specific activities that each of the states must complete before OCR would find them in compliance with Title VI. OCR requested that the specified activities be completed no later than December 31, 1988. The primary areas in which OCR requested additional action by the states relate to failure to complete promised enhancements to traditionally black institutions (primarily improvements to facilities and equipment) and failure to fully implement measures designed to desegregate student enrollment. A complete listing of the deficient items as identified by OCR is provided as Attachment 2 to this letter. Most of these states have indicated that they will substantially complete the specified measures in advance of the December 1988 date.

IV. Courses of Conduct Available to the Commonwealth

At present, the Commonwealth is in a state of legal limbo, as its OCR Plan has expired but OCR has not made any decision as to the Commonwealth's fulfillment of its Plan commitments. Our advice as to the courses of conduct available to the state with regard to continuing the commitments contained in the Plan may thus be divided into two scenarios: (1) if OCR does not determine that any

additional actions are required by the state in fulfillment of the Plan, which would include the period of time from the present until OCR makes a decision; or (2) if OCR determines that additional actions are required by the state under its Plan.

A. If OCR Does not Determine that Additional Actions are Required

During the period of time before OCR makes its decision on Kentucky, and after OCR makes a decision if it decides Kentucky has successfully completed its Plan, the Commonwealth has considerable flexibility in charting its course of action with regard to continuing the specific activities enumerated in the Plan.

The Commonwealth could decide to continue to implement the entirety of the activities developed as part of the OCR Plan. While we believe that the state has no legal obligation to do so since the Plan, as approved by OCR, had a five-year duration and has since expired, a decision to continue all of the Plan activities could be made if the state determines, as a matter of policy and in the exercise of its own discretion, that such a course of action is best for the citizens of the Commonwealth.

Alternatively, the State could decide to cease all of the activities enumerated in the OCR Plan. Since the state no longer has any obligation under its agreement with OCR to continue any particular activities, it may determine that it is no longer in the state's interest to continue any of those activities.

Finally, the state could choose a middle ground, namely, continuing those Plan activities that it determines are most effective and productive, while discontinuing those determined to have become ineffective or nonproductive. If the Commonwealth were to choose this course of action, it should review each of the activities enumerated in the Plan and determine which to continue, which to modify and which to discontinue, based upon the interests of the state and its citizens. Since there is no legal obligation to continue any specific activities, the state would have complete discretion as to which activities to continue, as well as what new activities to initiate.

Since the expiration of the Plan in June 1987, the Commonwealth has begun to implement the third option

described above, chiefly in conjunction with the development and implementation of its Strategic Plan for Higher Education in Kentucky. In this context, since the Strategic Plan is a state initiative and not a result of federal mandate, the state is free to add or cease specific desegregation activities at any time.

B. If OCR Determines that Additional Actions Are Required

OCR may make a determination that the state has not sufficiently complied with the commitments contained in its Plan, and that the failures were sufficient to put the Commonwealth out of compliance with Title VI. The state would then have to decide whether or not to agree with OCR's conclusion and abide its additional directives, or challenge the conclusion and its effects.

If the alleged failures were minor or easily remediable, the state could decide to comply, so that OCR could then make a formal pronouncement that the Commonwealth had remedied the vestiges of segregation and was now in compliance with Title VI. Such a course of action would have a favorable public impact without imposing further onerous obligations on the state and its institutions. On the other hand, if the additional demands by OCR were deemed excessive, the Commonwealth could decline to do so on the basis that it had determined that it was in fact in compliance with the requirements of Title VI, regardless of its compliance with specific Plan commitments. (It must be emphasized that the Plan does not define compliance with Title VI. Rather, the successful completion of the Plan is a manner through which the Commonwealth was to achieve such compliance.) OCR would then either agree with the state and reverse its determination (which could happen) or attempt to force the state to undertake additional activities. To accomplish the latter, OCR would have to make a new determination that the Commonwealth is presently not in compliance with Title VI (not simply that it has not completed one or more Plan commitments) and is therefore subject to enforcement proceedings.

Given the accomplishments the state has made over the last six years, and the previously enunciated doubts as to whether the state was ever not in compliance with Title VI, we believe it would be unlikely for OCR to make such a determination today. Moreover, in our opinion, were OCR to so act, it is extremely unlikely that the agency would be

able to sustain a legal action against the Commonwealth alleging that the state is presently in violation of Title VI. We emphasize the term "presently." Any legal action brought against the state now would have to look to the present status of public higher education in Kentucky, not the status seven years ago when the Commonwealth was first cited by OCR. From that perspective, it is difficult to envision that the Department of Education could successfully challenge the state's present compliance with the statutory mandate of Title VI.

This is not to say that Kentucky should not continue its equal opportunity efforts. On the contrary, such efforts have had and in all likelihood will continue to have laudable, desirable results. The mandate of Title VI ought to be viewed as a legal threshold, not the ultimate societal goal. To the extent Plan-derived activities support the social goals of the Commonwealth in assuring equal opportunity and access, they should be continued. But to the extent Plan activities are no longer germane to that goal, or in fact have proven counterproductive or inefficient uses of scarce resources, the Commonwealth should not hesitate to discontinue their use. The goals of assuring equality of access and treatment and of eliminating the traces of the old dual system ought not be subordinated to a slavish adherence to years-old procedures.

* * * * *

We look forward to meeting with you and the Committee on Equal Opportunities in Louisville on July 28.

Sincerely,

Michael B. Goldstein

Blain B. Butner

BBB:cr
Enclosures

Status Of Higher Education Desegregation In Other States

ALABAMA

Following institution of a suit against the state by the Department of Justice in 1983, the federal district court in Alabama in December 1985 found remnants of segregation and ordered the state to develop a statewide plan. In February 1986, the Governor and the Commission on Higher Education submitted separate plans for the court's review. Immediately thereafter, the Court of Appeals granted a motion by some of the plaintiff institutions and the Governor to appeal the 1985 decision and to stay enforcement of that order. In October 1987, the Court of Appeals upheld the appeal, mandating a new hearing. A group of plaintiffs composed of alumni from traditionally black institutions in the state appealed to the U.S. Supreme Court to overturn the Court of Appeals' decision. In June 1988 the Supreme Court refused to hear the case. Efforts are ongoing within the state to address some of the problems concerned in the case, but further hearings have not yet been scheduled in the district court.

ARKANSAS

Arkansas began implementing its state plan in 1978, and amended it under OCR's guidance in October 1983. This revised plan expired in December 1985. In February 1988, OCR formally informed the state that it was in full compliance with Title VI and that no further actions were necessary.

DELAWARE

Delaware's state plan expired June 1986. OCR informed the Governor in February 1988 that the state needed to renovate and develop certain buildings and properties, and increase the budget for the library of Delaware State College, before it could be found in full compliance with Title VI. By the time the Department's findings reached the Governor, renovation to two of the four properties cited were completed; the remaining two have been or will be completed by December 1988, the Department's deadline. In addition, funds were budgeted for Delaware State College to remedy its library deficiencies. The state has informed OCR of these actions, but has received no final decision from OCR.

FLORIDA

Florida's state plan was revised in September 1983 and expired in December 1985. The state submitted two update reports after its expiration date. In February 1988 OCR informed the Governor that nine specific measures would have to be completed before the state could be found in full compliance with Title VI. Seven of the nine measures involved community colleges and, according to the state, these measures have been implemented. With regard to the two measures involving universities, the proposed construction projects at Florida A & M University are underway and the other program changes are being implemented. The state expects to be found in full compliance with all commitments.

GEORGIA

Although Georgia's state plan expired in December 1985, the state has voluntarily submitted additional annual progress reports since that time. In February 1988 OCR identified three primary deficiencies prohibiting a finding of full compliance with Title VI. One of these concerned construction and renovation of buildings at a variety of the state's traditionally black institutions, all of which are currently under construction and scheduled for completion by October 1988. The second deficiency concerned joint administration of the Agricultural Extension Program at the University of Georgia and Fort Valley State College. According to the state, provisions of land grant and other legislation raise problems for federal funding of the program if it were to be jointly administered as OCR recommended, and the state has written to OCR explaining this situation. Finally, OCR cited a failure to implement steps to encourage transfers between Darton College and Albany State College. The state reports that many measures it had already taken in this regard were not included in OCR's report, and it has informed the Department of these, as well as of additional steps it has taken to address this concern.

LOUISIANA

Louisiana has been implementing a state plan approved by federal court consent decree in 1981, which was scheduled to expire in December 1987. At that time the court extended the consent decree for 90 days, and set a September 1988 trial date to determine whether the state is in compliance with Title VI and whether the consent decree should continue or be dissolved. Negotiations are currently underway between the state and the Department of Justice to

reach an agreement on these matters prior to the September trial date.

MARYLAND

After being tied up in federal court for several years, Maryland succeeded in having its state plan approved by the Department of Education in September 1985. Under the plan, which will expire in June 1989, the state has been submitting annual progress reports, the third of which is due in August 1988.

MISSISSIPPI

Mississippi has been operating under a plan approved by the Department of Justice. Most of the state's junior colleges have met their plan goals and have been released from their plans. The trial with regard to the senior colleges took place from April through June 1987, and in December 1987 the court determined that the state was in compliance with Title VI and federal desegregation requirements. This decision is currently on appeal to the Fifth Circuit Court of Appeals. Briefs in the case are expected to be submitted in fall 1988, with a decision from the court expected by mid-1989.

MISSOURI

Missouri's state plan expired in June 1986. In February 1988, OCR identified three items that the University of Missouri at Columbia needed to accomplish in order for the state to be in compliance with Title VI. Two of the items were primarily administrative changes and one involved minority recruitment of graduate students. According to the state, all of these items had been completed before February 1988, so that the state expects that it will be found in full compliance with Title VI in the near future.

NORTH CAROLINA

A statewide plan for senior colleges was approved by a federal judge in July 1981, and expired in December 1987. However, the court has retained jurisdiction through December 1988. In addition, a separate plan for the state's community college system was approved by the Department of Education in September 1983. That plan expired in December 1985. In February 1988, the Department informed the state that, with regard to its community college system, the state was in full compliance with Title VI.

OHIO

OCR failed to obtain an acceptable plan from Ohio, and thus referred the state to the Department of Justice in February 1983, with the recommendation to commence litigation against the state. To date, the Justice Department has taken no action in the case. Ohio still has submitted no plan, and has taken no additional action of its own.

OKLAHOMA

Oklahoma's state plan expired in December 1985. In February 1988, OCR found that to be in compliance with Title VI the state needed to take steps to enhance facilities at Langston University, and to eliminate program duplication between Langston and Northeastern Oklahoma University. The Oklahoma legislature appropriated funds in July 1988 for the facilities at Langston. The state has also resolved the program duplication issue. In addition, the state is continuing many of the programs initiated under its plan, expanding them to include other minority groups in the state, such as Native Americans and Hispanics.

PENNSYLVANIA

Pennsylvania began implementing its state plan in 1983, and the plan expired in June 1988. Its final report on the plan is due to OCR in August. The Department conducted final site visits in May 1988.

SOUTH CAROLINA

South Carolina's plan was accepted by OCR in July 1981 and expired in June 1986. Subsequently, the state developed its own plan focusing on minority student recruitment and retention, entitled "Equity for Equal Opportunity in Public Institutions of Higher Education for 1986, 1987 and Beyond." In February 1988, OCR informed South Carolina that it had fully implemented its OCR plan and that it was in full compliance with Title VI.

TENNESSEE

Tennessee has never been an Adams state, and hence has never submitted a plan to OCR, because various suits had already been brought against the state by private parties. In September 1984 the federal district court approved a consent agreement between the state and the plaintiffs, containing elements similar to those in other Adams state plans. In 1985 the Department of Justice appealed this agreement to the Sixth Circuit Court of Appeals questioning

the constitutionality of certain race-conscious elements in the district court's consent agreement. In September 1986 the Court of Appeals found adequate grounds for the state's race-conscious remedies and affirmed the consent decree. The consent decree is scheduled to expire in September 1989.

TEXAS

This is the final year for Texas' state plan, which is scheduled to expire in August 1988. State officials believe the state has successfully implemented its plan, although they have received very little feedback from OCR.

VIRGINIA

Virginia's state plan expired June 1986. In February 1988, OCR identified 13 remaining areas to improve, the most of any state reviewed by the Department. Eleven of these thirteen items related to enhancements at the state's two traditionally black institutions, Virginia State University and Norfolk State University, in conjunction with the accreditation of several of their programs. The state has informed OCR that eight of the eleven proposals dealing with these enhancements were completed and the remaining three were expected to be completed by OCR's December 31, 1988 deadline. The other two measures were the establishment of a minority counselling center at Longwood College, and publishing of minority recruitment brochures at various community colleges, both of which have been completed, according to the state.

WEST VIRGINIA

West Virginia's state plan was accepted by the Department of Education in June 1981, and expired in June 1986. In February 1988, OCR informed the state that it was in full compliance with Title VI.

Remaining Deficiencies Identified by the Office for Civil Rights in the Six States Whose State Plans Have Expired

In February 1988, the Department of Education notified the Governors of six states that they had failed to implement satisfactorily certain measures of their state plans, and that the Department was thus not able to find the states in full compliance with Title VI. The specific deficiencies identified by OCR are listed below.

DELAWARE

OCR recommended that the following actions be taken at Delaware State College (DSC), the state's traditionally black institution:

1. Complete the renovation of Delaware Hall, Loockerman Hall, and the Old Library.

2. Complete the installation of cooling systems in the Science Center and Business Administrative Building.

3. Develop the Silver Lake frontage.

4. Increase the budget allocation for the library and remedy other deficiencies to meet accrediting agency standards applicable as of June 30, 1986.

In addition, OCR noted that while DSC increased the number of library volumes to meet the standards applicable at the time the plan was adopted, the formula used by accrediting agencies raises the standard when an institution adds students and increases the diversity of its programs. Since both factors changed at DSC during the life of the plan, the library did not contain a sufficient number of volumes when the plan expired. The state also failed to appropriate acceptable funding for the DSC library and to maintain the requisite number of journals during the life of the plan.

FLORIDA

OCR directed Florida to complete measures in two primary areas before it could be considered in compliance:

enhancements to Florida A & M University and implementation of measures designed to desegregate student enrollment and faculty and staff employment at certain institutions. Specifically, the following should be undertaken:

1. The State must complete renovations to Perry-Paige Hall, Jackson-Davis Hall, Lee Hall, and the laboratory school at Florida A & M University.

2. Broward Community College must establish a measure designed to achieve the same plan objective as the minority financial aid program in subjects where black students are under-represented as described in the plan.

3. Central Florida Community College must implement a measure designed to achieve the same plan objective as the minority scholarship program in its Allied Health Program described in the plan.

4. Chipola Community College must implement a measure designed to achieve the same plan objective as the minority recruitment and scholarship program for the Allied Health Program described in the plan.

5. St. Johns River Community College must fully implement several planned recruitment activities.

6. Broward and Pasco Hernando Community Colleges must implement a measure designed to accomplish the same plan objective as the scholarship program for black graduate students.

7. Edison Community College must implement the special recruitment efforts to attract black staff, as set forth in the plan.

8. Florida Atlantic University must implement a measure designed to accomplish the same plan objective as the Achievement Grant Program to improve the promotion potential of minorities described in the Plan.

9. Central Florida Community College and Florida Keys Community College must certify implementation of recruitment measures designed to attract black employment applicants.

GEORGIA

OCR identified two primary areas of deficiencies: enhancements to three of the state's traditionally black

institutions and ensuring implementation of measures designed to desegregate student enrollment at two other institutions. Specific recommendations were:

1. Complete construction of the Student Union Building at Albany State College, the Administration Building at Fort Valley State College, and the Business Administration Building at Savannah State College, and complete renovation of the Miller/Tabor complex at Fort Valley State College.

2. Fully implement the plan to administer jointly the Agricultural Extension Program at the University of Georgia and Fort Valley State College.

3. Fully implement steps to encourage students at Albany Junior College to transfer to Albany State College.

MISSOURI

OCR recommended that one institution, the University of Missouri at Columbia (UMC), implement the following measures designed to desegregate student enrollment:

1. Create a mechanism for Lincoln University students to transfer course credits to the UMC Library Science Program.

2. Develop a consortium between the Social Work Program and certain public undergraduate institutions to facilitate graduate enrollment at the UMC School of Social Work.

3. Ensure that measures to recruit minority graduate students are fully implemented each year, either through a recruitment coordinator or by some other means.

OKLAHOMA

OCR recommended that Oklahoma make enhancements to Langston University as follows:

1. Provide remaining funds for instructional equipment at Langston University.

2. Document whether unnecessary program duplication exists between Langston University and Northeastern Oklahoma State University and, if so, take additional measures to eliminate such duplication.

VIRGINIA

OCR cited Virginia for not completing proposed enhancements to its two traditionally black institutions, Virginia State University (VSU) and Norfolk State University (NSU), and for failing to implement certain measures regarding desegregation of student enrollment. To comply, Virginia must:

1. Increase faculty salaries at VSU.

2. Improve the library collection at VSU as instructed by the Virginia Secretary of Education in 1985.

3. Take measures to satisfy the requirements for accreditation of the VSU School of Business.

4. Take measures to satisfy the requirements for accreditation of the VSU Engineering Technology Program.

5. Implement a comparable program at VSU designed to meet the same plan objective as the discontinued Nursing Program.

6. Establish the proposed undergraduate program in computer science at VSU.

7. Complete certain renovation projects at VSU, as set forth in the "Maintenance Survey Report" submitted to OCR on October 22, 1985.

8. Construct an addition to the Life Sciences Building at NSU.

9. Finish the renovation of GWC Brown Hall at NSU.

10. Take measures to satisfy the requirements for accreditation of the NSU School of Business.

11. Take measures to satisfy the requirements for accreditation of the NSU Computer Science Program.

12. Fully establish a center for minority affairs at Longwood College.

13. Develop at sixteen community colleges a recruitment brochure oriented towards black students.

CHE/Statutory
April 14, 1983

Agenda Item: E-1

HIGHER EDUCATION DESEGREGATION PLAN

Information:

On Friday, March 24, Judge John Pratt issued the attached order setting out deadlines by which time the U. S. Office for Civil Rights shall accept state higher education desegregation plans or plan amendments or initiate proceedings to enforce Title VI of the Civil Rights Act of 1964. The Legal Defense Fund (LDF) sought further relief in its long standing legal battle with OCR concerning OCR's alleged failure to require states with formerly dual systems of higher education to present acceptable higher education desegregation plans in a timely fashion. In February, the U. S. Department of Justice responded by proposing an order rescinding all such deadlines; however Judge Pratt directed that the Department prepare an order for his consideration specifying deadlines for each state.

The order issued on March 24 directs OCR to either accept Kentucky's plan in 120 days from the date of the order or initiate enforcement proceedings. This approach was agreed to by LDF, the government and Judge Pratt and represents no change in the negotiations between the Commonwealth and OCR. Kentucky is very close to the completion and submission of all materials to OCR and final approval of the Kentucky Higher Education Desegregation Plan is expected within 30 to 60 days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH ADAMS, et al.,

Plaintiffs,

v.

TERREL H. BELL, SECRETARY OF EDUCATION, et al.,

Defendants.

Civil Action No. 3095-70

ORDER

The Court has considered plaintiffs' Renewed Motion for urther Relief Concerning State Systems of Higher Education, defendants' opposition thereto, plaintiffs' reply, the oral arguments of counsel and he entire record herein. Based thereon, the Court enters the following indings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arkansas, Georgia, Virginia, Oklahoma, Florida and North Carolina*

A. Findings

1. The Revised Criteria Specifying the Ingredients of Acceptable

*/ All references to North Carolina relate to the state's community college system only.

Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (February 15, 1978)(the Criteria) require each of the above states to desegregate its system of public higher education over a five year period culminating in the 1982-83 academic year.

2. In 1978 and 1979 the Department of Health, Education and Welfare (HEW) accepted plans to desegregate formerly de jure segregated public higher education systems from Arkansas, Florida, Georgia, Oklahoma, and Virginia, and from North Carolina's community college system. The plans expire at the end of the 1982-83 academic year.

3. Each of these states has defaulted in major respects on its plan commitments and on the desegregation requirements of the Criteria and Title VI. Each state has not achieved the principal objectives in its plan because of the state's failure to implement concrete and specific measures adequate to ensure that the promised desegregation goals would be achieved by the end of the five year desegregation period.

4. Since 1980 defendants have written repeated "evaluation" letters to each of the states, setting forth in great detail their defaults under the plans and requesting that the states take corrective measures. In January, 1983 defendants again notified each state of its default and requested each state to submit, within 60 days, new measures in the form of addenda to the plans on file, which will address the deficiencies listed in the evaluation letters and any other matters needed to make the plans complete and effective.

5. To avoid further delay in achieving full compliance with state plans and in desegregating state systems of higher education, defendants must ensure that prior to the commencement of the 1983-84 academic year, each state has committed itself to concrete and specific measures that reasonably ensure compliance no later than the fall of 1985. To the extent possible, those measures must be implemented by the fall of 1983. Where legislative action or other requirements dictate the need for additional time, the measures must be in place at the latest by the fall of 1984.

6. In January, 1983 the Office of Civil Rights (OCR) provisionally approved amendments to the Virginia Plan, extending for three years (until the end of the 1985-86 academic year), the time within which said state must achieve its planned desegregation goals.

B. Injunction

Defendants, their successors, agents and employees, are enjoined:

1. With respect to Arkansas, Georgia, Oklahoma, Florida and North Carolina, to require each state to submit by June 30, 1983 a plan containing concrete and specific measures that reasonably ensure that all the goals of its 1978 desegregation plan will be met no later than the fall of 1985; and to commence, no later than September 15, 1983, formal Title VI enforcement proceedings against any state which has failed to submit a plan containing concrete and specific measures reasonably ensuring achievement of the state's goals and commitments contained in its 1978 plan no later than the fall of 1985.

2. For each state which has submitted a plan which defendants find reasonably ensures achievement of the state's goals as stipulated in its 1978 plan, to require such state to submit to defendants all appropriate data concerning its performance during the 1983-84 academic year no later than February 1, 1984.

3. To evaluate said data by April 1, 1984 to determine whether the state has achieved substantial progress toward the goals of its plan during the 1983-84 academic year.

4. With respect to said first tier states, which have submitted acceptable plans pursuant to Paragraph B.1., supra, as well as Virginia, to commence not later than September 15, 1984 formal Title VI enforcement proceedings against any state which has failed to achieve substantial progress in the 1983-84 academic year.

II. Pennsylvania, Texas and Kentucky

A. Findings

1. In its Second Supplemental Order issued April 1, 1977, the Court found that desegregation plans from inter alia, Pennsylvania, and approved by defendants, "did not meet important desegregation requirements and . . . failed to achieve significant progress toward higher education desegregation." Adams v. Califano, 430 F. Supp. 118, 119 (D.D.C. 1977). The Court, however, deferred consideration of Pennsylvania's noncompliance with Title VI because of pending negotiations between that state and HEW with particular reference to Cheyney State College. Id., at 120.

2. In January, 1981, defendants notified Pennsylvania that it had failed to submit an adequate desegregation plan and required the submiss of such a plan within 60 days. Defendants also notified Pennsylvania that they would evaluate the state's submission within 60 additional days and would commence formal enforcement proceedings against the state in May, 1981 if the state's submission failed to comply with Title VI, in accordance with a previous order of this Court. Pennsylvania was directed to include within such remedial plan the "state-related" institutions of Pennsylvania State, University of Pittsburgh, Temple University and Lincoln University, as well as the state's 13 community colleges.

3. Pennsylvania has refused to submit a desegregation plan which in defendants' judgment complies with Title VI and has refused to include the institutions referred to in the preceding paragraph in such a plan. Defendants, however, have failed to commence formal enforcement proceedings against the state.

4. Under the Order of this Court entered December 18, 1980 (¶ 1), defendants were required to commence enforcement proceedings against Texas within 120 days of finding that the state had not eliminated the vestiges of its former de jure segregated system of higher education unless an acceptable plan of desegregation was submitted.

5. In January, 1981, defendants found that Texas had failed to eliminate the vestiges of its former dual system.

6. At that time defendants also provisionally accepted a desegregation plan from Texas contingent upon the state's submission by June 15, 1981 of certain additional commitments required to desegregate the system fully.

7. Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI. Defendants have failed to commence formal enforcement proceedings against the state.

8. The Texas legislature meets once per biennium. Once the current session closes, it is not scheduled to reconvene until 1985. The assistance of the Texas legislature will be necessary to arrange funding to implement the commitments made by the State of Texas to desegregate its system of higher education.

9. Despite this Court's Order of September 17, 1981, requiring a resolution of Kentucky's compliance status by January 15, 1982, Kentucky's desegregation plan was only provisionally accepted by defendants on January 29, 1982 contingent upon the state's submission by August 31, 1982 of certain additional commitments and actions. Certain of those commitments and actions were not forthcoming from Kentucky as of August 31, 1982.

10. OCR has still not received a desegregation plan from Kentucky which in defendants' judgment complies with the Criteria and Title VI. Defendants have failed to commence formal enforcement proceedings against the state.

B. Injunction

Defendants, their successors, agents and employees are enjoined, within 120 days from the date of this Order, to commence formal Title VI enforcement proceedings against Pennsylvania and Kentucky unless defendants

conclude that those states have submitted desegregation plans which fully conform to the Criteria and Title VI. Pennsylvania's plan shall encompass each of the state-related institutions as well as the state's community colleges. Defendants, their successors, agents and employees are enjoined to commence formal Title VI enforcement proceedings against Texas within 45 days from the date of this Order unless defendants conclude that Texas has submitted a desegregation plan in full conformity with the Criteria and Title VI.

III. West Virginia, Missouri and Delaware

A. Findings

1. Since January, 1981 OCR has accepted higher education desegregation plans from West Virginia, Missouri and Delaware.

2. OCR's investigations and letters of findings established that the last remnants of the formerly segregated systems of public higher education in West Virginia and Missouri were limited to the University of West Virginia and three institutions in Missouri. The plans from those two states included only those institutions.

3. While the United States Court of Appeals for the District of Columbia Circuit stated that "[t]he problem of integrating higher education must be dealth with on a state-wide rather than a school-by-school basis", Adams v. Richardson, 480 F.2d 1159, 1164 (D.C.Cir. 1973), we are satisfied that the Court made reference to "system-wide imbalance." Only one institution in West Virginia and three in Missouri were found to be racially identifiable and were

therefore properly included in the state plan. There has been no showing of "system-wide imbalance." The decision not to include the remaining institutions in the state plan involves a judgment, which OCR, in its discretion, was entitled to make.

4. In the January, 1983 evaluation letters to West Virginia and Missouri, OCR noted that both states, for the most part, were successful in their efforts to meet the goals and objectives of the first year of their plans. In the course of implementing their plans, both states took into account institutions not within the states' plans.

5. The plan from Delaware accepted by OCR was state-wide in effect.

6. The plans accepted from West Virginia, Missouri and Delaware by OCR comply with the requirements of the law and with respect to said states, plaintiffs are entitled to no relief.

IV. Reporting

A. Findings

Defendants are presently not required by any Order of this Court to report systematically to plaintiffs concerning their Title VI enforcement with respect to public higher education desegregation relating to the within named states. Such reporting in the future will facilitate monitoring of compliance with the Orders of this Court and with Title VI requirements.

B. Injunction

Defendants, their successors, agents and employees, are enjoined

to provide the following to counsel for the plaintiffs or their designated agent:

1. Copies of all desegregation plans or amendments to previously approved plans at least 10 days in advance of defendants' final approval of such plans or amendments in order to permit plaintiffs to submit written objections with respect thereto.

2. Copies of the annual statistical reports and the annual narrative reports from the states within 10 days of their receipt by defendants.

3. Copies of OCR's written evaluations of the states' compliance with their plans, and the states' responses thereto within 30 days of the receipt of said responses.

4. Copies of OCR's letters of findings arising from compliance reviews or complaints concerning public higher education institutions within 0 days of the transmittal of such letters to the states or institutions.

John H. Pratt
United States District Court

March 24th, 1983.

TOTAL PUBLIC FUNDS
STATE GENERAL FUND APPROPRIATIONS* & TUITION AND FEE REVENUE
FISCAL YEAR 1999-2000 THROUGH FISCAL YEAR 2003-04

	Actual FY 1999-00	1999-00 Percentage Total Public Funds	Actual FY 2003-04	2003-04 Percentage Total Public Funds
Eastern Kentucky University				
Total General Fund Appropriation	$ 65,726,700	64%	$ 71,448,100	56%
Total Tuition and Fee Revenue	37,475,000	36%	55,043,700	44%
Total Public Funds	103,201,700		126,491,800	
Kentucky State University				
Total General Fund Appropriation	$ 20,872,800	72%	$ 22,286,600	66%
Total Tuition and Fee Revenue	7,919,200	28%	11,487,400	34%
Total Public Funds	28,792,000		33,774,000	
Morehead State University				
Total General Fund Appropriation	$ 38,121,700	64%	$ 41,599,300	55%
Total Tuition and Fee Revenue	21,783,400	36%	34,530,900	45%
Total Public Funds	59,905,100		76,130,200	
Murray State University				
Total General Fund Appropriation	$ 45,024,100	62%	$ 50,179,100	54%
Total Tuition and Fee Revenue	27,756,600	38%	43,228,000	46%
Total Public Funds	72,780,700		93,407,100	
Northern Kentucky University				
Total General Fund Appropriation	$ 34,721,700	48%	$ 45,127,300	41%
Total Tuition and Fee Revenue	38,072,000	52%	65,867,000	59%
Total Public Funds	72,793,700		110,994,300	
University of Kentucky				
Total General Fund Appropriation	$ 284,394,700	73%	$ 293,541,000	66%
Total Tuition and Fee Revenue	107,051,700	27%	153,769,800	34%
Total Public Funds	391,446,400		447,310,800	
University of Louisville**				
Total General Fund Appropriation	$ 163,357,500	69%	$ 171,859,400	60%
Total Tuition and Fee Revenue	74,163,000	31%	113,666,000	40%
Total Public Funds	237,520,500		285,525,400	
Western Kentucky University				
Total General Fund Appropriation	$ 59,589,500	61%	$ 68,811,500	49%
Total Tuition and Fee Revenue	38,648,000	39%	71,224,900	51%
Total Public Funds	98,237,500		140,036,400	
KCTCS***				
Total General Fund Appropriation	$ 163,646,400	81%	$ 184,747,600	65%
Total Tuition and Fee Revenue	48,430,100	24%	99,269,200	35%
Total Public Funds	202,294,400		284,016,800	
Lexington Community College				
Total General Fund Appropriation	$ 6,440,600	37%	$ 9,054,500	36%
Total Tuition and Fee Revenue	10,960,200	63%	16,248,200	64%
Total Public Funds	17,400,800		25,302,700	
System Total				
Total General Fund Appropriation	$ 881,895,700	68%	$ 958,654,400	59%
Total Tuition and Fee Revenue	412,259,200	32%	664,335,100	41%
Total Public Funds	1,294,154,900		1,622,989,500	

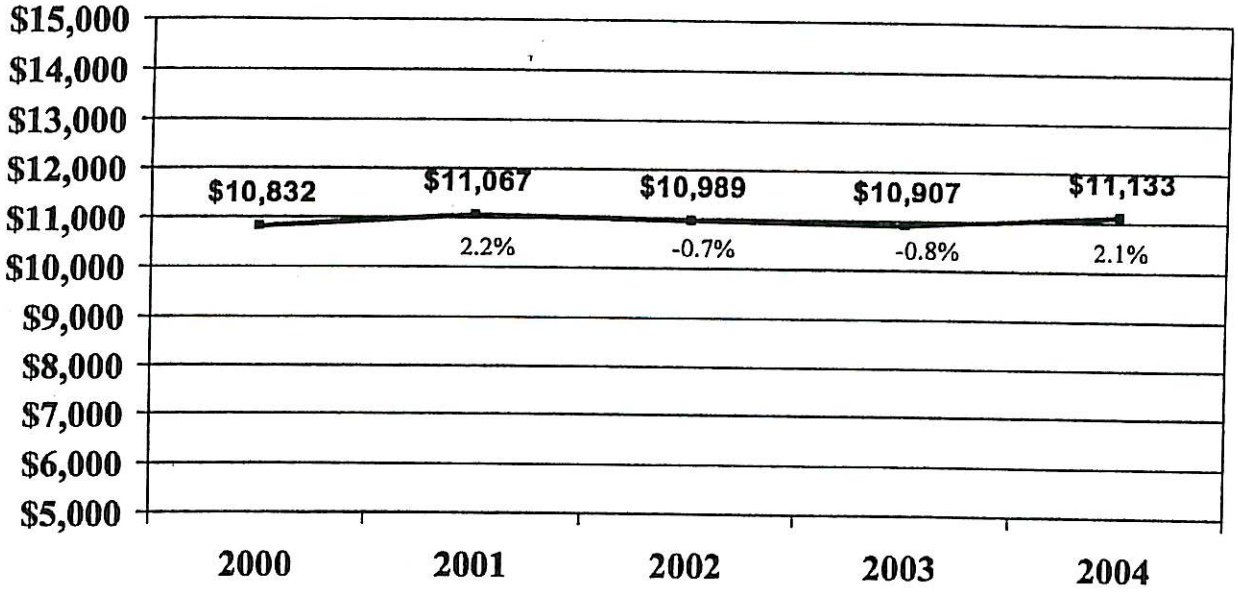
* Reflects all enacted budget reductions.
** Includes state support for UofL hospital contract.
Source: Appropriations - Budget of the Commonwealth and Budget Reduction Orders.
Gross tuition and fee revenue - Cpe Comprehensive Database

KENTUCKY PUBLIC COLLEGES AND UNIVERSITIES - FULL-TIME UNDERGRADUATE RESIDENT TUITION AND FEES
(Annual Rates)

	EKU		KCTCS		KSU		Morehead		Murray		Northern		UK (Lower Division)		UK (Upper Division)		U of L		WKU	
	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change	Student Charges	Annual % Change
1998-99	2,190	6.3%	1,140	3.6%	2,170	5.9%	2,270	5.6%	2,300	8.5%	2,264	4.8%	3,016	10.2%	3,016	14.7%	2,920	11.0%	2,260	5.6%
1999-00	2,390	9.1%	1,180	3.5%	2,300	6.0%	2,440	7.5%	2,400	4.3%	2,408	6.4%	3,296	9.3%	3,296	9.3%	3,406	16.6%	2,390	5.8%
2000-01	2,542	6.4%	1,230	4.2%	2,440	6.1%	2,510	2.9%	2,556	6.5%	2,700	12.1%	3,446	4.6%	3,446	4.6%	3,447	1.2%	2,534	6.0%
2001-02	2,706	6.5%	1,450	17.9%	2,648	8.5%	2,710	8.0%	2,754	7.7%	2,820	4.4%	3,734	8.4%	3,734	8.4%	3,954	14.7%	2,844	12.2%
2002-03	2,928	8.2%	1,536	5.9%	3,134	18.4%	2,926	8.0%	3,032	10.1%	3,216	14.0%	3,974	6.4%	3,974	6.4%	4,082	3.2%	3,312	16.5%
2003-04*	3,358	14.7%	1,896	23.4%	3,370	7.5%	3,364	15.0%	3,436	13.3%	3,744	16.4%	4,546	14.4%	4,546	14.4%	4,450	9.0%	3,850	16.2%
2004-05**	3,792	12.9%	2,208	16.5%	3,834	13.8%	3,840	14.1%	3,984	15.9%	4,368	16.7%	5,164	13.6%	5,314	16.9%	5,040	13.3%	4,596	19.4%
2005-06***			2,352	6.5%			4,378	14.0%			4,920	12.6%	5,913	14.5%	6,085	14.5%	5,531	9.7%	5,400	17.5%

*Includes midyear tuition increase at WKU and one-time tuition surcharge of $100 for Spring 2004 at EKU.
**Includes midyear tuition increases at WKU and KSU.
***Includes midyear tuition increase at WKU. Tuition rates for 2005-06 for KCTCS and WKU reflect board action. Proposed tuition and fee rate increases for the remaining institutions reflect numbers in news accounts but not final board action. It is anticipated that final board action for all institutions by June.

Public Funds (State Appropriation + Tuition and Fees) Per Full Time Equivalent Student Kentucky Public Postsecondary Institutions



Source: Council on Postsecondary Education

Note: Total public funds per FTE increased by 2.8% over this period while the Consumer Price Index rose by 9.9%.

Appendix 6

Summary of Supreme Court Decision in Gratz and Grutter

June 2003

NIXON PEABODY LLP
ATTORNEYS AT LAW

EDUCATION LAW AND POLICY ALERT

The U.S. Supreme Court Decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger* (Issued June 23, 2003)

Case Analysis and Lessons Learned Regarding the Use of Race by Colleges and Universities

By Art Coleman and Scott Palmer

Introduction

In *Gratz v. Bollinger*[1] and *Grutter v. Bollinger*,[2] the U.S. Supreme Court affirmed the authority of colleges and universities to consider race or ethnicity[3] as one factor among many in admissions decisions where necessary to further their *compelling* interest in promoting the educational benefits of diversity. The Court also held that when colleges and universities pursue this interest, only program designs that ensure individualized consideration of applicants (and their diversity attributes) can be sufficiently *narrowly tailored* to meet federal legal requirements. Thus, the Court upheld the University of Michigan Law School's admissions policy (in *Grutter*), which includes an individualized, full-file review of all applications, while striking down the University of Michigan's undergraduate admissions policy (in *Gratz*), which assigns points to applicants based on certain admissions criteria, including race and ethnicity.

Taken together, these decisions affirm longstanding legal standards – emanating from Justice Powell's 1978 decision in *Regents of the University of California v. Bakke*[4] – and provide a framework that can help guide colleges and universities as they review and consider the use of race-conscious policies in admissions, financial aid, recruitment, and other arenas. This Education Law and Policy Alert from Nixon Peabody LLP provides an initial analysis of *Gratz* and *Grutter* and their implications for higher education, including:

- **Background** on relevant federal law and the Court's decisions (page 2);
- **Key Points and Lessons Learned** from the cases (page 4); and
- **Action Steps** to guide colleges and universities moving forward (page 7).

Nixon Peabody's Education Team is a leader in preventive law services in education – helping education leaders achieve their educational goals – including their diversity goals – in a manner that meets federal legal requirements. For more information, contact Art Coleman or Scott Palmer at (202) 585-8000 or www.nixonpeabody.com.

Background

The Legal Landscape

Under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, classifications based on race are inherently suspect, and race-conscious policies are, therefore, subject to "strict scrutiny."[5] Under this standard, the consideration of race in conferring benefits at both public universities and private universities that receive federal funds will be upheld only where the given program serves a "compelling state interest" and is "narrowly tailored" to achieve that interest. Strict scrutiny thus involves an examination of both the ends and the means of race-conscious decisions to ensure that the interests pursued are sufficiently compelling and that the means are narrowly tailored to those ends, so that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."

Prior to the University of Michigan decisions, the Supreme Court had previously held that an institution's *remedial* interest in overcoming the present effects of past discrimination (though not general "societal" discrimination) can be sufficiently compelling to justify the use of race. Furthermore, in his landmark decision in *Bakke*, Justice Powell held that a university's *non-remedial* interest in promoting the educational benefits of diversity could justify the use of race in admissions as one factor among many. However, his "diversity rationale" was rendered in a "compromise" opinion that did not expressly command a majority of the Court. As a consequence, although it became the basis for most higher education programs that consider race or ethnicity, the diversity rationale also became the focus of recent litigation. Most notably, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*[6] concluded that Justice Powell's opinion did not constitute the holding of the Court, and that diversity was not a compelling interest under federal law. The *Gratz* and *Grutter* cases put the diversity rationale directly before the Supreme Court.

In short, the Court in *Gratz* and *Grutter* addressed two issues in deciding whether the University of Michigan's admissions programs were lawful under the 14th Amendment, Title VI, and 42 U.S.C. §1981:[7]

1. Whether the University's interest in promoting the educational benefits of diversity was sufficiently *compelling* to justify using race or ethnicity as a factor; and

2. Whether the specific programs were sufficiently *narrowly tailored* to meet that interest.

The Decisions

In *Gratz* and *Grutter*, the Supreme Court affirmed and expanded upon the principles laid out by Justice Powell in *Bakke*, holding that a university's interest in promoting the educational benefits of diversity are sufficiently compelling to justify the consideration of race and ethnicity in admissions decisions. The Court also described the characteristics of admissions programs that can be sufficiently narrowly tailored to serve that interest.

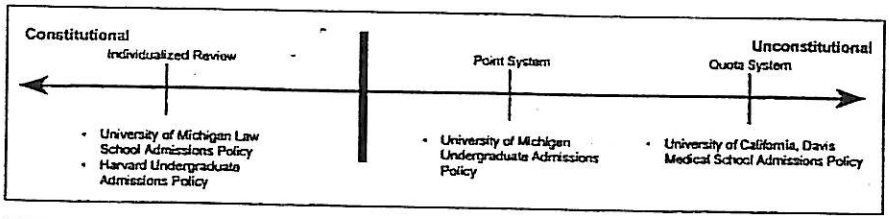
Although both of the University of Michigan's challenged admissions programs considered race or ethnicity as one factor among many with the goal of promoting the educational benefits of diversity, the policies differed in their design. The law school admissions process at issue in *Grutter* involved an individualized, holistic review of each applicant's file that considered both

academic criteria (grades, LSAT scores) and other criteria that were important to the law school's educational goals (such as work experience, leadership and service, letters of recommendation, and life experiences, including whether the applicant was an underrepresented minority). The undergraduate admissions process at issue in *Gratz* used a "Selection Index" where each applicant was awarded points toward admission based on preset criteria, with the maximum number of points awarded to any applicant totaling 150. Underrepresented minorities (as well as socio-economically disadvantaged students and students who attended a high school that served a predominately minority population) received 20 points under this program.

In *Grutter*, the Court (by a vote of 5-4) upheld the law school admissions program in its entirety. The Court recognized that the law school's interest in promoting the educational benefits of diversity is a sufficiently compelling interest to justify consideration of race or ethnicity as one of several factors in admissions decisions. The Court emphasized that it would show deference to the educational judgment of colleges and universities in valuing a diverse student body as part of their educational mission. The Court further found that the law school's individualized review was narrowly tailored – and consistent with the Harvard University admissions plan endorsed by Justice Powell in *Bakke* – in that the admissions program used an individualized review that was flexible, considered multiple factors, and was not unduly burdensome to non-minority applicants.

In *Gratz*, the Court (by a vote of 6-3) recognized (per the Court's decision in *Grutter*) that the undergraduate program served a compelling interest in diversity, but held that the University's admissions program was not sufficiently narrowly tailored because it used a point system that automatically awarded minority students 20 points regardless of other factors and did not allow for an individualized review and comparison of the full breadth or depth of diversity factors.

UNIVERSITY ADMISSIONS PLANS ANALYZED BY U.S. SUPREME COURT



The U.S. Supreme Court affirmed the lawfulness of The University of Michigan Law School admissions policy (in *Grutter*) based in part on its individualized review of all applicants (and their diversity attributes) – likening it to the Harvard University admissions policy (referenced with approval by Justice Powell in *Bakke*). The Court held unlawful the University of Michigan undergraduate admissions policy (in *Gratz*) based in part on its point system (which did not permit an individualized review), and had previously held unlawful the University of California, Davis Medical School admissions policy (in *Bakke*) based on its use of a rigid quota.

Key Decision Points and Lessons Learned[8]

The Court's decisions in *Gratz* and *Grutter* do not establish fundamentally new legal standards. Rather, the cases apply the "strict scrutiny" standard in a specific way to address head-on the question of whether and how universities may consider race or ethnicity as one factor among many to further their interest in promoting the educational benefits of diversity. The cases, therefore, provide an important framework and valuable insights for colleges and universities to use in reviewing their race-conscious, diversity-based programs. Key lessons from the Court's opinions include the following:

1. **The interest of colleges and universities in promoting the educational benefits of diversity, where applicable, is sufficiently compelling to justify the use of race or ethnicity in university admissions.** At the core of its decisions, the Court held that the interest of both the University of Michigan's Law School and its undergraduate program in promoting the educational benefits of diversity is sufficiently compelling to justify the limited use of race in student admissions (expressly rejecting the notion that only "remedial" interests can be "compelling").

   a. **Justice Powell's 1978 opinion in *Bakke* is a correct statement of the law.** The Court expressly "endorse[d]" Justice Powell's opinion and its "diversity rationale," which for 25 years has "served as the touchstone for constitutional analysis of race-conscious admissions policies." As a consequence, the Fifth Circuit's decision in *Hopwood v. Texas* is nullified in so far as it held that the diversity rationale could not be sufficiently compelling to justify race-based admissions programs. By contrast, legislative initiatives that prohibit the use of race as a matter of state policy, such as Proposition 209 in California, are not directly affected by the Court's decisions because the pursuit of diversity-related goals is a policy choice, not a federal legal requirement.

   b. **Colleges and universities are entitled to deference in their mission-driven educational judgments.** Recognizing that context matters when evaluating the legality of race-conscious programs under strict scrutiny, the Court held that the higher education context is unique. According to the Court, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Therefore, the Court deferred to the University of Michigan's educational judgment that diversity is essential to its educational mission, and held that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"

   c. **The educational benefits of diversity are "substantial" and "are not theoretical but real."** In finding this diversity interest to be compelling, the Court strongly endorsed the educational benefits of diversity. The Court recognized that "race unfortunately still matters" in our society and that racial diversity in colleges and universities can help enliven classroom discussions, break down racial stereotypes, and prepare students for success in our increasingly global marketplace. Notably (though its meaning in application requires further examination), the Court also stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. According to the Court, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... In order to cultivate a set of leaders with legitimacy in the eyes of the

citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

The Court rendered its determination of the compelling nature of the diversity rationale based in part on substantial evidence regarding the educational benefits of diversity provided by the University and *amici*, including expert studies and reports and opinions from business and military leaders. Importantly, the Court's decision indicates that where a university's interest in promoting the educational benefits of diversity is central to its mission – a point on which the Court indicated that deference is required though evidence is relevant – then that interest is compelling as a matter of law.

d. **Colleges and universities may pursue a goal of admitting a "critical mass" of minority students as part of their effort to assemble a diverse student body.** The Court held that colleges and universities, in order to promote the educational benefits of diversity, can seek to enroll a "critical mass" of students from different racial and ethnic groups – so long as the critical mass is "defined by reference to the educational benefits that diversity is designed to produce," and the goal is not "some specified percentage of a particular group merely because of its race or ethnic origin."

In so holding, the Court distinguished between the establishment of permissible numerical goals and illegal quotas:

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal... require[s] only a good-faith effort... to come within a range demarcated by the goal itself, ... and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'" (Internal citations omitted.)

2. **Admissions programs that consider race or ethnicity to promote the educational benefits of diversity must ensure that those factors are considered only to the extent necessary and in a manner consistent with their mission-driven diversity goals.** The Court reaffirmed and expounded upon the basic "narrow tailoring" standards that have guided federal courts for decades, making important distinctions between the University of Michigan Law School's admissions program in *Grutter* and the University's undergraduate admissions program in *Gratz*.

   a. **Admissions programs that consider race or ethnicity under the diversity rationale must be designed to ensure individualized review of applicants and their diversity attributes.** The Court held that the importance of individualized consideration of applicants "in the context of a race-conscious admissions program is paramount." To satisfy this standard, universities seeking to justify the use of race or ethnicity in student admissions based on the diversity rationale must include an individualized, non-mechanical, full-file review of each applicant. "In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"

Thus, the Court in *Grutter* upheld the law school's admissions program, which consisted of a "highly individualized, holistic review" of each applicant's qualifications, including diversity factors beyond race. By contrast, the Court in *Gratz* struck down the undergraduate admission program, which consisted of a point system where 20 points were automatically awarded to each applicant who was an underrepresented minority. In the Court's eyes, the undergraduate admissions system did not guarantee a sufficiently individualized review by which the full breadth and depth of each applicant's diversity experiences could be evaluated and compared to other applicants. Moreover, the Court stated that the fact that the adoption of an individualized admissions programs might present administrative challenges or burdens based on the volume of applications some colleges and universities receive does not excuse them from the obligation of adopting admissions policies that meet federal constitutional and statutory mandates.

b. **Colleges and universities must consider race-neutral alternatives in good faith, but need not exhaust every option or sacrifice broader educational goals before using race-conscious programs.** According to the Court, the need to ensure the limited consideration of race "does not require exhaustion of every conceivable race-neutral alternative.... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Thus, the Court encouraged colleges and universities to examine and learn from others with regard to race-neutral alternatives as promising practices develop.

The Court stressed, however, that the consideration of race-neutral alternatives would be evaluated in the overall context of diversity and other mission-driven goals. The Court held that colleges and universities need not sacrifice their "academic quality" or broader educational goals in considering the efficacy of race-neutral alternatives. Thus, a college and university is not required to deemphasize such factors as grades or test scores to promote diversity before using race. In addition, the Court expressly questioned the propriety of "percentage plans" in the diversity context, stating, "[E]ven assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."

3. **Colleges and universities must perform periodic reviews of their race-based admissions programs, and such programs cannot be timeless.** The Court reaffirmed that a core purpose of the Fourteenth Amendment is to eliminate distinctions based on race, and, therefore, "race-conscious admissions policies must be limited in time." According to the Court, "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." This is consistent with longstanding narrow tailoring requirements, which require periodic review of race-conscious programs.

Finally, the Court ended its opinion in *Grutter* with a concrete prognostication (and notice) for the higher education community and the nation, saying, "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Action Steps for Colleges and Universities

The Court's decisions in *Gratz* and *Grutter* reaffirm the authority of colleges and universities to define and pursue their educational mission – including the educational benefits of diversity – within federal constitutional and statutory parameters. These parameters are made more clear by the Court's decisions, which build on existing legal standards and provide important information that can guide colleges and universities. As a matter of sound policy – and as required by constitutional law as part of narrow tailoring – it is incumbent on each college and university in light of the Court's decisions to review its race-based policies in admissions, financial aid, recruitment, and more.[9] The following are several recommended steps that colleges and universities should take in that regard:

- ☐ **Inventory all race- and ethnicity-based policies *and* all other diversity-related policies (even if facially race-neutral), including admissions, financial aid, outreach, recruitment, and employment policies.**
- ☐ **Establish an inter-disciplinary strategic planning team and a process to evaluate the relevant policies, now and over time.**
- ☐ **Identify the diversity-related educational goals and supporting evidence that justify each of the relevant policies.**
- ☐ **Rigorously consider race-neutral alternatives in light of institutional goals.**
- ☐ **Ensure that any consideration of race is as limited as possible consistent with institutional diversity goals, including that admissions processes are individualized, flexible, and holistic.**

ENDNOTES

[1] *Gratz et al. v. Bollinger et al.*, No. 02-516, 539 U.S. __ (June 23, 2003).
[2] *Grutter v. Bollinger et al.*, No. 02-241, 539 U.S. __ (June 23, 2003).
[3] In several places, this Alert uses the term "race" or "ethnicity" to stand for both race and ethnicity, such as with regard to "race-conscious" actions.
[4] *University of California v. Bakke*, 438 U.S. 265 (1978).
[5] The Fourteenth Amendment prohibits states from denying "any person within [their] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Title VI prohibits discrimination "under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.
[6] *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).
[7] Section 1981 provides that all persons "shall have the same right ... to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. §1981. Applicable to private conduct, §1981 proscribes "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment."
[8] This section of the Alert discusses the Supreme Court's decisions in *Gratz* and *Grutter* taken together. All quotations are from the Court's opinion in either *Gratz* or *Grutter*.
[9] See generally Arthur L. Coleman, *Diversity in Higher Education: A Strategic Planning and Policy Manual* (The College Board, 2001).

Lessons from the University of Michigan Decisions: Diversity Counts and Context Matters

Prepared for The College Board's Regional Seminars on Diversity in Higher Education
August, 2003

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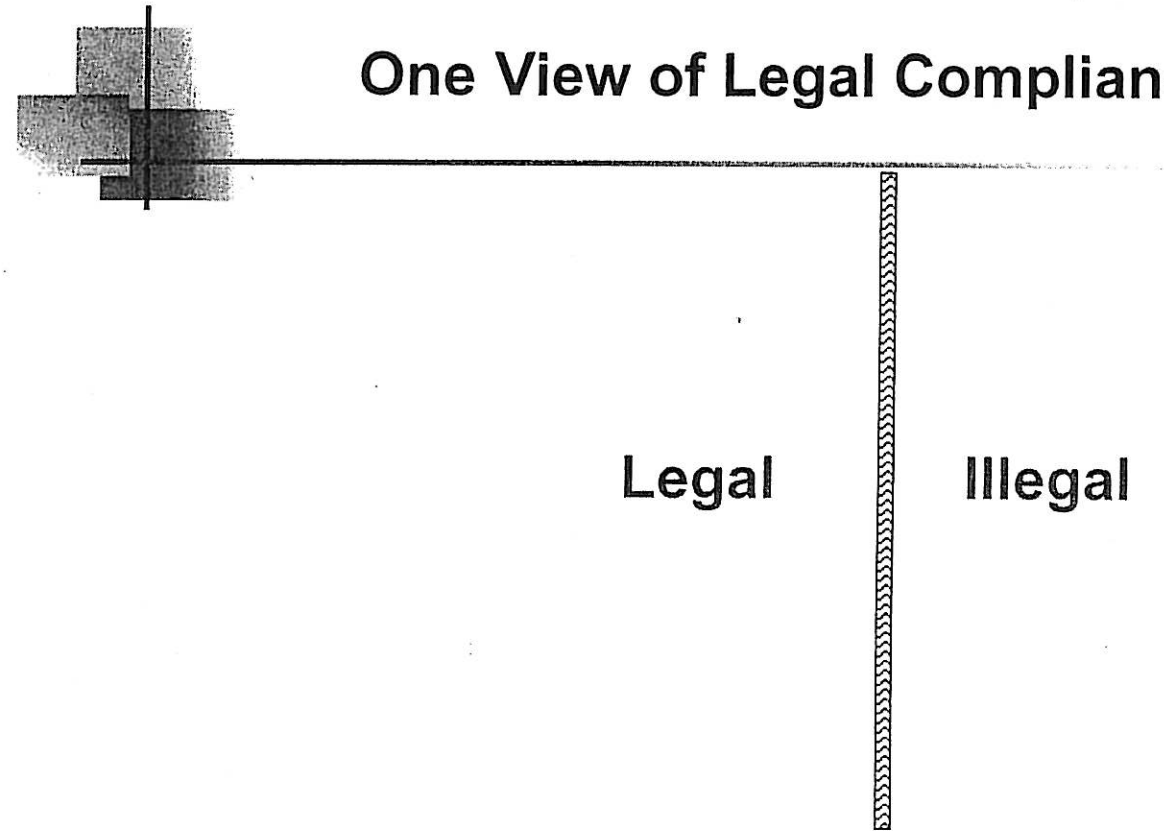
One View of Legal Compliance…



A Preventive Law Perspective: When Evaluating Policies, Legal Sufficiency is Likely A Question of Location on a Spectrum, Based on Educational Judgments

The University of Michigan Decisions: Key Rulings

- The educational benefits of diversity can justify the limited consideration of race when making admissions decisions.
  - As a matter of law, the benefits of diversity constitute a compelling interest.
- Race-conscious admissions policies must provide for individual student evaluations, rather than provide an "automatic" system that awards points based on race.

The University of Michigan Decisions: Key Questions

1. What evidence regarding the benefits of diversity must higher education institutions assemble to support their race-conscious admissions programs?

2. Under what circumstances must higher education institutions consider or try race-neutral alternatives to promote their diversity-related goals?

3. How may the Court's decisions affect race-conscious financial aid, outreach/recruitment, and employment practices?

1. The Analysis of Diversity Interests: What Evidence is Necessary?

- The Educational Benefits of Diversity
  - Defined with reference to goals of enrolling a critical mass of students from various backgrounds, with deference to educational judgments
  - Recognized as "substantial" and "real", based upon:
    - The institutional mission of the University (assembling a "broadly diverse" class)
    - Testimony regarding enhanced classroom discussion
    - Expert and research studies demonstrating the educational benefits of diversity
    - External perspectives related to the institutional mission
      - Employers
      - Military

2. The Analysis of Alternatives: Is the Consideration of Race Necessary?

- Race Neutral Alternatives
  - Must be evaluated in the context of institutional goals. Institutions:
    - Must undertake "serious, good faith consideration of workable race-neutral alternatives" that may achieve diversity-related ends
    - Need not attempt every conceivable race-neutral alternative, especially if such an effort would undermine other mission-driven goals
  - Note: Percentage plans may not be viable alternatives in all cases
    - The formulaic approach of percentage plans may preclude needed individualized consideration of student applicants when pursuing a full range of diversity interests

3. The Analysis of Other Race-Based Practices: Does Context Matter?

- Facts control results.
  - Particular facts will shape legal conclusions.
    - Strict scrutiny standards apply to all race-conscious practices, but...
    - Not all race-conscious practices (admissions, recruitment, financial aid) are evaluated identically
  - Note: The U.S. Dept. of Education has concluded that there are "important differences" between admissions and financial aid decisions in this legal context
    - Race-conscious financial aid may have less negative impact on non-beneficiaries than in race-conscious admissions decisions
      - If the race-conscious practice is eliminated...
      - When considering the total pool of $$...

Other Points of Note...

- Six justices voted to affirm Justice Powell's *Bakke* opinion as the law of the land
- The Court expanded on Justice Powell's concept of diversity with a focus on access
- The Court did not address other potentially "compelling interests"
- Purely private conduct (contracting) appears to be subject to strict scrutiny standards

Conclusion

- Every institution has a legal obligation to periodically review and evaluate its race-conscious policies
- Many questions have been answered...and a new generation of questions must be addressed in the context of policy reviews and audits
- The U.S. Department of Education Office for Civil Rights can be expected to apply the principles of the University of Michigan decisions in its case resolutions and policy guidance.

Dimensions of Diversity:
Legal Lessons From The United States Supreme Court's University of Michigan Decisions

Arthur L. Coleman
Scott R. Palmer*

Race and ethnicity matter. Educational judgments merit deference. And diversity counts. Affirming these fundamental principles as a matter of federal law, the United States Supreme Court in *Gratz v. Bollinger*[i] and *Grutter v. Bollinger*[ii] ruled that colleges and universities have the authority to consider race or ethnicity[iii] as one factor among many in admissions decisions to further their *compelling* interest in promoting the educational benefits of diversity. The Court also held that when institutions pursue this interest, only admissions programs that ensure individualized consideration of applicants can be sufficiently *narrowly tailored* to meet legal requirements. Thus, the Court upheld the University of Michigan Law School's admissions policy (in *Grutter*), which included an individualized, full-file review of all applications, but struck down the University of Michigan's undergraduate admissions policy (in *Gratz*), which assigned preset points to applicants based on certain admissions criteria, including race and ethnicity.

These decisions affirm—and build upon—Justice Powell's 1978 opinion in *Regents of the University of California v. Bakke* regarding the educational benefits of diversity in higher education.[iv] They also expand on the existing federal "strict scrutiny" framework in important ways that can help guide colleges and universities as they review and consider the use of race-conscious policies in admissions, financial aid, recruitment, and employment practices.

The Dimensions of Diversity in Higher Education

The Court in *Grutter* described at length the educational benefits of diversity that constitute a compelling interest that can justify the use of race in college and university admissions. These benefits emanate from higher education's overarching mission—to prepare students for "work and citizenship" and to sustain "our political and cultural heritage"— and from the indisputable fact that "race unfortunately still matters" in our society. In this context, the Court found that diverse learning environments can enhance "cross-racial understanding," "break down racial stereotypes," improve learning outcomes, and better prepare students for a diverse workforce and society. In short, the Court concluded that the university's educational judgment that diversity is essential to its mission is entitled to a degree of deference and that the compelling nature of diversity in higher education is supported by a wide array of evidence.

In addition, the Court recognized the importance of "openness and integrity" in higher education institutions and stressed the importance of students from all racial and ethnic groups having access to public universities and law schools. In the specific case of *Grutter*, the Court recognized that law schools are "the training ground for a large number of our Nation's leaders," and the Court concluded, "[I]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

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Practical Lessons from the Court Decisions

The Court's central rulings provide important information that should help higher education leaders evaluate and refine race-conscious policies. The following questions (and answers) emanate from the Court's decisions:

1. **What foundations should support the pursuit and design of race-conscious admissions programs?**

Premised upon long-standing constitutional principles affirming the academic freedom of higher education institutions, the Court provided deference to the University's "educational judgment" that diversity was "essential to its educational mission." The Court then reviewed the evidence regarding the "substantial" benefits of diversity—ranging from University-specific evidence to evidence provided by other parties filing briefs in the case, notably including expert reports and opinions from business and military leaders. With these foundations, the Court concluded that diversity is a "compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."

The Court also explained that colleges and universities may seek to promote diversity through the enrollment of a "critical mass" of students from different racial and ethnic groups, so long as the critical mass is "defined by reference to the educational benefits that diversity is designed to produce;" and the goal is not "some specified percentage of a particular group merely because of its race or ethnic origin." The Court admonished that "outright racial balancing...is patently unconstitutional."

Finally, when examining the design of the challenged admissions practices, the Court emphasized the need for individualized judgments regarding the University's applicants: "In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"

The Court's opinions suggest, therefore, that higher education institutions seeking to justify race-conscious practices based on diversity interests should ensure the following:

- Mission-specific educational goals include diversity-related interests that can support race-conscious policies;
- Specific race-conscious policies do materially advance diversity-related goals, consistent with relevant evidence (which may include general as well as institution-specific evidence and research); and
- Policy and program designs are precisely tailored to meet institutional diversity interests, including with respect to admissions an individualized review of applicants.

2. **What race-neutral alternatives must institutions with race-conscious programs consider?**

When addressing the legal requirement that higher education institutions consider and try, as appropriate, race-neutral alternatives to their race-conscious programs, the Court first clarified that the need to examine those alternatives "does not require exhaustion of every conceivable race-neutral alternative." The Court stated: "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." The Court also emphasized that race-neutral alternatives should be evaluated in the overall context of an institution's diversity and other mission-driven goals. More specifically, the Court held that colleges and universities need not

"choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." Thus, a college or university is not required to deemphasize academic factors to promote diversity before using race.

3. **What impact will the Court's decisions regarding admissions policies at the University of Michigan have on higher education policies in the areas of financial aid, recruitment, and employment?**

Although the Court was silent on applicability of its admissions rulings to other higher education practices, it affirmed a relevant principle of federal law: "context matters." In other words, while strict scrutiny standards apply to all race-conscious practices, those standards may apply in different ways to different programs. Thus, the degree to which a college or university may rely on the Court's determination that the educational benefits of diversity are compelling as a matter of law to support its race-conscious policies will depend on an institutional evaluation that addresses several questions. First, does the race-conscious policy or program advance the goal of achieving the educational benefits of diversity, which is at the core of the institution's mission? If the answer to that question is "yes," does the policy or program also reinforce individualized diversity by using race in the most limited way, consistent with institutional goals?[v] While the Court's rulings should undoubtedly inform this evaluation, it is especially important to evaluate the Court's fact-intensive analysis—most visibly regarding the design and operation of the two admissions policies—with sensitivity to the context that shaped its conclusions.[vi]

Conclusion

The Court in *Grutter* observed that "race-conscious admissions policies must be limited in time." More concretely, it communicated the "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today." This admonition highlights the need for all institutions employing race-conscious programs to periodically review and refine their programs to ensure that their use of race is limited to advance diversity related educational goals.

ENDNOTES

[i] *Gratz et al. v. Bollinger et al.*, No. 02-516, 539 U.S. __ (June 23, 2003).
[ii] *Grutter v. Bollinger et al.*, No. 02-241, 539 U.S. __ (June 23, 2003).
[iii] In this article, the term "race" or "ethnicity" stands for both race and ethnicity, such as with regard to "race-conscious" actions.
[iv] *University of California v. Bakke*, 438 U.S. 265 (1978).
[v] See generally *Diversity in Higher Education: A Strategic Planning and Policy Manual (The College Board, 2001)* (including a detailed, action-oriented series of relevant policy questions to address in the context of federal non-discrimination standards).
[vi] See generally *Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964*, 59 Fed. Reg. 8756 (February 23, 1994) (noting important and material differences between admissions and financial aid practices in the context of a strict scrutiny analysis).

Appendix 7

U.S. Supreme Court Decision in Gratz v. Bollinger

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337

SUPREME COURT OF THE UNITED STATES

Syllabus

GRATZ ET AL. *v.* BOLLINGER ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02–516. Argued April 1, 2003—Decided June 23, 2003

Petitioners Gratz and Hamacher, both of whom are Michigan residents and Caucasian, applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively. Although the LSA considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied early admission and were ultimately denied admission. In order to promote consistency in the review of the many applications received, the University's Office of Undergraduate Admissions (OUA) uses written guidelines for each academic year. The guidelines have changed a number of times during the period relevant to this litigation. The OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During all relevant periods, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.

Petitioners filed this class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U. S. C. §1981. They sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated their rights to nondiscriminatory treatment, an injunction prohibiting respondents from continuing to dis-

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criminate on the basis of race, and an order requiring the LSA to offer Hamacher admission as a transfer student. The District Court granted petitioners' motion to certify a class consisting of individuals who applied for and were denied admission to the LSA for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher, whose claim was found to challenge racial discrimination on a classwide basis, was designated as the class representative. On cross-motions for summary judgment, respondents relied on Justice Powell's principal opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 317, which expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. The court agreed with respondents as to the LSA's current admissions guidelines and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines for 1995 through 1998 operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion, and thus granted petitioners summary judgment with respect to respondents' admissions programs for those years. While interlocutory appeals were pending in the Sixth Circuit, that court issued an opinion in *Grutter* v. *Bollinger*, *post*, p. ___, upholding the admissions program used by the University's Law School. This Court granted certiorari in both cases, even though the Sixth Circuit had not yet rendered judgment in this one.

Held:

1. Petitioners have standing to seek declaratory and injunctive relief. The Court rejects JUSTICE STEVENS' contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim is at best conjectural or hypothetical rather than real and immediate. The "injury in fact" necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666. In the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory policy prevents it from doing so on an equal basis. *Ibid.* In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. Hamacher was denied admission to the University as a freshman ap-

Syllabus

plicant even though an underrepresented minority applicant with his qualifications would have been admitted. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race. Also rejected is JUSTICE STEVENS' contention that such use in undergraduate transfer admissions differs from the University's use of race in undergraduate freshman admissions, so that Hamacher lacks standing to represent absent class members challenging the latter. Each year the OUA produces a document setting forth guidelines for those seeking admission to the LSA, including freshman and transfer applicants. The transfer applicant guidelines specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to diversity are *identical* to those used to evaluate freshman applicants. The *only* difference is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest justifying its consideration of the race of its undergraduate applicants. See *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 159; *Blum* v. *Yaretsky*, 457 U. S. 991, distinguished. The District Court's carefully considered decision to certify this class action is correct. Cf. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469. Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain the action. Pp. 11–20.

2. Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter* v. *Bollinger*, *post*, at 15–21, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve educational diversity. In *Bakke*, Justice Powell explained his view that it would be permissible for a university to employ an admissions program in

Syllabus

which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." 438 U. S., at 317. He emphasized, however, the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315. The current LSA policy does not provide the individualized consideration Justice Powell contemplated. The only consideration that accompanies the 20-point automatic distribution to all applicants from underrepresented minorities is a factual review to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *id.*, at 317, the LSA's 20-point distribution has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant, *ibid.* The fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. The record does not reveal precisely how many applications are flagged, but it is undisputed that such consideration is the exception and not the rule in the LSA's program. Also, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant. The Court rejects respondents' contention that the volume of applications and the presentation of applicant information make it impractical for the LSA to use the admissions system upheld today in *Grutter*. The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See, *e.g.*, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 508. Nothing in Justice Powell's *Bakke* opinion signaled that a university may employ whatever means it desires to achieve diversity without regard to the limits imposed by strict scrutiny. Pp. 20–27.

3. Because the University's use of race in its current freshman admissions policy violates the Equal Protection Clause, it also violates Title VI and §1981. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U. S. 275, 281; *General Building Contractors Assn.* v. *Pennsylvania*, 458 U. S. 375, 389–390. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 27–28.

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Reversed in part and remanded.

REHNQUIST, C. J. delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BREYER, J., joined in part. THOMAS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which BREYER, J., joined as to Part I.

SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d), or 42 U. S. C. §1981." Brief for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year

that a final decision regarding her admission had been delayed until April. This delay was based upon the University's determination that, although Gratz was "'well qualified,'" she was "'less competitive than the students who ha[d] been admitted on first review.'" App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his "'academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.'" *Ibid.* Hamacher's application was subsequently denied in April 1997, and he enrolled at Michigan State University.[1]

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan against the University of Michigan, the LSA,[2] James Duderstadt, and Lee Bollinger.[3] Petitioners' complaint was a class-action suit alleging "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment . . . , and for racial discrimi-

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[1] Although Hamacher indicated that he "intend[ed] to apply to transfer if the [LSA's] discriminatory admissions system [is] eliminated," he has since graduated from Michigan State University. App. 34.

[2] The University of Michigan Board of Regents was subsequently named as the proper defendant in place of the University and the LSA. See *id.*, at 17.

[3] Duderstadt was the president of the University during the time that Gratz's application was under consideration. He has been sued in his individual capacity. Bollinger was the president of the University when Hamacher applied for admission. He was originally sued in both his individual and official capacities, but he is no longer the president of the University. *Id.*, at 35.

nation in violation of 42 U. S. C. §§1981, 1983, and 2000d *et seq.*" App. 33. Petitioners sought, *inter alia*, compensatory and punitive damages for past violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from "continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student.[4] *Id.*, at 40.

The District Court granted petitioners' motion for class certification after determining that a class action was appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2). The certified class consisted of "those individuals who applied for and were not granted admission to the College of Literature, Science and the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission." App. 70–71. And Hamacher, whose claim the District Court found to challenge a "'practice of racial discrimination pervasively applied on a classwide basis,'" was designated as the class representative. *Id.*, at 67, 70. The court also granted petitioners' motion to bifurcate the proceedings into a liability and damages phase. *Id.*, at 71. The liability phase was to determine "whether [respondents'] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth

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[4] A group of African-American and Latino students who applied for, or intended to apply for, admission to the University, as well as the Citizens for Affirmative Action's Preservation, a nonprofit organization in Michigan, sought to intervene pursuant to Federal Rule of Civil Procedure 24. See App. 13–14. The District Court originally denied this request, see *id.*, at 14–15, but the Sixth Circuit reversed that decision. See *Gratz* v. *Bollinger*, 188 F. 3d 394 (1999).

Amendment to the Constitution." *Id.*, at 70.[5]

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process.[6] In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified . . . applicant" from these groups. App. to Pet. for Cert. 111a.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an appli-

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[5]The District Court decided also to consider petitioners' request for injunctive and declaratory relief during the liability phase of the proceedings. App. 71.

[6]Our description is taken, in large part, from the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process" filed by the parties in the District Court. App. to Pet. for Cert. 108a–117a.

cant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status.[7] For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was

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[7] In 1995, counselors used four such tables for different groups of applicants: (1) in-state, nonminority applicants; (2) out-of-state, nonminority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. But each cell on these two tables contained separate courses of action for minority applicants and nonminority applicants whose GPA 2 scores and ACT/SAT scores placed them in that cell.

applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the "'development of the selection index for admissions in 1998 changed only the mechanics, not the substance of how race and ethnicity were considered in admissions.'" App. to Pet. for Cert. 116a.

In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the

academic year through the use of "protected seats." Specific groups—including athletes, foreign students, ROTC candidates, and underrepresented minorities—were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University,[8] (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or

[8] LSA applicants who are Michigan residents must accumulate 80 points from the selection index criteria to be flagged, while out-of-state applicants need to accumulate 75 points to be eligible for such consideration. See App. 257.

deny each applicant.

C

The parties filed cross-motions for summary judgment with respect to liability. Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. §2000d, and the Equal Protection Clause of the Fourteenth Amendment. Respondents relied on Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter* v. *Bollinger*, *post*, at 10–13, Justice Powell, in *Bakke*, expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. See 438 U. S., at 317. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. Respondent-intervenors asserted that the LSA had a compelling interest in remedying the University's past and current discrimination against minorities.[9]

The District Court began its analysis by reviewing this Court's decision in *Bakke*. See 122 F. Supp. 2d 811, 817 (ED Mich. 2001). Although the court acknowledged that

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[9]The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F. Supp. 2d 790 (ED Mich. 2001). The court explained that respondent-intervenors "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." *Id.*, at 795. We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.

no decision from this Court since *Bakke* has explicitly accepted the diversity rationale discussed by Justice Powell, see 122 F. Supp. 2d, at 820–821, it also concluded that this Court had not, in the years since *Bakke*, ruled out such a justification for the use of race. 122 F. Supp. 2d, at 820–821. The District Court concluded that respondents and their *amici curiae* had presented "solid evidence" that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. See *id.*, at 822–824.

The court next considered whether the LSA's admissions guidelines were narrowly tailored to achieve that interest. See *id.*, at 824. Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. See 122 F. Supp. 2d, at 827. The court emphasized that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. See *ibid.* The award of 20 points for membership in an underrepresented minority group, in the District Court's view, was not the functional equivalent of a quota because minority candidates were not insulated from review by virtue of those points. See *id.*, at 828. Likewise, the court rejected the assertion that the LSA's program operates like the two-track system Justice Powell found objectionable in *Bakke* on the grounds that LSA applicants are not competing for different groups of seats. See 122 F. Supp. 2d, at 828–829. The court also dismissed petitioners' assertion that the LSA's current system is nothing more than a means by which to achieve racial balancing. See *id.*, at 831. The court explained that the LSA does not seek to achieve a certain proportion of minority students,

let alone a proportion that represents the community. See *ibid.*

The District Court found the admissions guidelines the LSA used from 1995 through 1998 to be more problematic. In the court's view, the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots. See *id.*, at 832. This system, the court concluded, operated as the functional equivalent of a quota and ran afoul of Justice Powell's opinion in *Bakke*.[10] See 122 F. Supp. 2d, at 832.

Based on these findings, the court granted petitioners' motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and respondents' motion with respect to the LSA's admissions programs for 1999 and 2000. See *id.*, at 833. Accordingly, the District Court denied petitioners' request for injunctive relief. See *id.*, at 814.

The District Court issued an order consistent with its rulings and certified two questions for interlocutory appeal to the Sixth Circuit pursuant to 28 U. S. C. §1292(b). Both parties appealed aspects of the District Court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter* v. *Bollinger*. The Sixth Circuit later issued an opinion in *Grutter*, upholding the admissions program used by the University of Michigan Law School,

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[10]The District Court determined that respondents Bollinger and Duderstadt, who were sued in their individual capacities under Rev. Stat. §1979, 42 U. S. C. §1983, were entitled to summary judgment based on the doctrine of qualified immunity. See 122 F. Supp. 2d, at 833–834. Petitioners have not asked this Court to review this aspect of the District Court's decision. The District Court denied the Board of Regents' motion for summary judgment with respect to petitioners' Title VI claim on Eleventh Amendment immunity grounds. See *id.*, at 834–836. Respondents have not asked this Court to review this aspect of the District Court's decision.

and the petitioner in that case sought a writ of certiorari from this Court. Petitioners asked this Court to grant certiorari in this case as well, despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so. See 537 U. S. 1044 (2002).

II

As they have throughout the course of this litigation, petitioners contend that the University's consideration of race in its undergraduate admissions decisions violates §1 of the Equal Protection Clause of the Fourteenth Amendment,[11] Title VI,[12] and 42 U. S. C. §1981.[13] We consider first whether petitioners have standing to seek declaratory and injunctive relief, and, finding that they do, we next consider the merits of their claims.

A

Although no party has raised the issue, JUSTICE STEVENS argues that petitioners lack Article III standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions. He first con-

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[11] The Equal Protection Clause of the Fourteenth Amendment explains that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[12] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. §2000d.

[13] Section 1981(a) provides that:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

tends that because Hamacher did not "actually appl[y] for admission as a transfer student[,] [h]is claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.'" *Post*, at 5 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not determinative of his ability to seek injunctive relief in this case. If Hamacher had submitted a transfer application and been rejected, he would still need to allege an intent to apply again in order to seek prospective relief. If JUSTICE STEVENS means that because Hamacher did not apply to transfer, he must never *really* have intended to do so, that conclusion directly conflicts with the finding of fact entered by the District Court that Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admission preference." App. 67.[14]

It is well established that intent may be relevant to standing in an Equal Protection challenge. In *Clements* v. *Fashing*, 457 U. S. 957 (1982), for example, we considered a challenge to a provision of the Texas Constitution requiring the immediate resignation of certain state officeholders upon their announcement of candidacy for another office. We concluded that the plaintiff officeholders had Article III standing because they had alleged that they *would have announced their candidacy* for other offices were it not for the "automatic resignation" provision they were challenging. *Id.*, at 962; accord, *Turner* v. *Fouche*, 396 U. S. 346, 361–362, n. 23 (1970) (plaintiff who did not own property had standing to challenge property ownership requirement for membership on school board even though there was no evidence that plaintiff had applied

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[14] This finding is further corroborated by Hamacher's request that the District Court "[r]equir[e] the LSA College to offer [him] admission as a transfer student." App. 40.

and been rejected); *Quinn* v. *Millsap*, 491 U. S. 95, 103, n. 8 (1989) (plaintiffs who did not own property had standing to challenge property ownership requirement for membership on government board even though they lacked standing to challenge the requirement "as applied"). Likewise, in *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain minority-owned businesses in the award of city contracts needed to show that one of its members would have received a contract absent the ordinance in order to establish standing. In finding that no such showing was necessary, we explained that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract." *Id.*, at 666. We concluded that in the face of such a barrier, "[t]o establish standing, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ibid.*

In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. When Hamacher applied to the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted. See App. to Pet. for Cert. 115a. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in under-

graduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.

JUSTICE STEVENS raises a second argument as to standing. He contends that the University's use of race in undergraduate transfer admissions differs from its use of race in undergraduate freshman admissions, and that therefore Hamacher lacks standing to represent absent class members challenging the latter. *Post*, at 5 (dissenting opinion). As an initial matter, there is a question whether the relevance of this variation, if any, is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a). The parties have not briefed the question of standing versus adequacy, however, and we need not resolve the question today: Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case.[15]

From the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting "diversity." See, *e.g.*, App. 38; Brief for Petitioners 13. Consistent with this challenge, petitioners

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[15]Although we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard. See, *e.g.*, Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U. C. D. L. Rev. 1239, 1240–1241 (1989); *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 149 (1982) (Mexican-American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican-American applicants" who were not hired by the same employer); *Blum* v. *Yaretsky*, 457 U. S. 991 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

requested injunctive relief prohibiting respondent "from continuing to discriminate on the basis of race." App. 40. They sought to certify a class consisting of all individuals who were not members of an underrepresented minority group who either had applied for admission to the LSA and been rejected or who intended to apply for admission to the LSA, for all academic years from 1995 forward. *Id.*, at 35–36. The District Court determined that the proposed class satisfied the requirements of the Federal Rules of Civil Procedure, including the requirements of numerosity, commonality, and typicality. See Fed. Rule Civ. Proc. 23(a); App. 70. The court further concluded that Hamacher was an adequate representative for the class in the pursuit of compensatory and injunctive relief for purposes of Rule 23(a)(4), see App. 61–69, and found "the record utterly devoid of the presence of . . . antagonism between the interests of . . . Hamacher, and the members of the class which [he] seek[s] to represent," *id.*, at 61. Finally, the District Court concluded that petitioners' claim was appropriate for class treatment because the University's "'practice of racial discrimination pervasively applied on a classwide basis.'" *Id.*, at 67. The court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2), and designated Hamacher as the class representative. App. 70.

JUSTICE STEVENS cites *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), in arguing that the District Court erred. *Post*, at 8. In *Blum*, we considered a class action suit brought by Medicaid beneficiaries. The named representatives in *Blum* challenged decisions by the State's Medicaid Utilization Review Committee (URC) to transfer them to lower levels of care without, in their view, sufficient procedural safeguards. After a class was certified, the plaintiffs obtained an order expanding class certification to include challenges to URC decisions to transfer patients to *higher* levels of care as well. The defendants argued that the

named representatives could not represent absent class members challenging transfers to higher levels of care because they had not been threatened with such transfers. We agreed. We noted that "[n]othing in the record . . . suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." 457 U. S., at 1001. And we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones. *Id.*, at 1001–1002 (noting, for example, that transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not).

In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions. Respondents challenged Hamacher's standing at the certification stage, but *never* did so on the grounds that the University's use of race in undergraduate transfer admissions involves a different set of concerns than does its use of race in freshman admissions. Respondents' failure to allege any such difference is simply consistent with the fact that no such difference exists. Each year the OUA produces a document entitled "COLLEGE OF LITERATURE SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS," which sets forth guidelines for all individuals seeking admission to the LSA, including freshman applicants, transfer applicants, international student applicants, and the like. See, *e.g.*, 2 App. in No. 01–1333 etc. (CA6), pp. 507–542. The guidelines used to evaluate transfer applicants specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of

diversity are *identical* to that used to evaluate freshman applicants. For example, in 1997, when the class was certified and the District Court found that Hamacher had standing to represent the class, the transfer guidelines contained a separate section entitled "CONTRIBUTION TO A DIVERSE STUDENT BODY." 2 *id.*, at 531. This section explained that any transfer applicant who could "*contribut[e] to a diverse student body*" should "generally be admitted" even with substantially lower qualifications than those required of other transfer applicants. *Ibid.* (emphasis added). To determine whether a transfer applicant was capable of "contribut[ing] to a diverse student body," admissions counselors were instructed to determine whether that transfer applicant met the "criteria as defined in Section IV of the 'U' category of [the] SCUGA" factors used to assess freshman applicants. *Ibid.* Section IV of the "U" category, entitled "Contribution to a Diverse Class," explained that "[t]he University is committed to a rich educational experience for its students. A diverse, as opposed to a homogenous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class." 1 *id.*, at 432. These indicators, used in evaluating freshman and transfer applicants alike, list being a member of an underrepresented minority group as establishing an applicant's contribution to diversity. See 3 *id.*, at 1133–1134, 1153–1154. Indeed, the *only* difference between the University's use of race in considering freshman and transfer applicants is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the

University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest that justifies its consideration of the race of its undergraduate applicants.[16]

Particularly instructive here is our statement in *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982), that "[i]f [defendant-employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test *clearly* would satisfy the . . . requirements of Rule 23(a)." *Id.*, at 159, n. 15 (emphasis added). Here, the District Court found that the sole rationale the University had provided for any of its race-based preferences in undergraduate admissions was the interest in "the educational benefits that result from having a diverse student body." App. to Pet. for Cert. 8a. And petitioners argue that an interest in "diversity" is not a compelling state interest that is *ever* capable of justifying the use of race in

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[16] Because the University's guidelines concededly use race in evaluating both freshman and transfer applications, and because petitioners have challenged *any* use of race by the University in undergraduate admissions, the transfer admissions policy is very much before this Court. Although petitioners did not raise a narrow tailoring challenge to the transfer policy, as counsel for petitioners repeatedly explained, the transfer policy is before this Court in that petitioners challenged any use of race by the University to promote diversity, including through the transfer policy. See Tr. of Oral Arg. 4 ("[T]he [transfer] policy is essentially the same with respect to the consideration of race"); *id.*, at 5 ("The transfer policy considers race"); *id.*, at 6 (same); *id.*, at 7 ("[T]he transfer policy and the [freshman] admissions policy are fundamentally the same in the respect that they both consider race in the admissions process in a way that is discriminatory"); *id.*, at 7–8 ("[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor").

undergraduate admissions. See, *e.g.*, Brief for Petitioners 11–13. In sum, the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines.[17] We therefore agree with the District Court's carefully considered decision to certify this class-action challenge to the University's consideration of race in undergraduate admissions. See App. 67 ("'It is a singular policy . . . applied on a classwide basis'"); cf. *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)). Indeed, class action treatment was particularly important in this case because "the claims of the individual students run the risk of becoming moot" and the "[t]he class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court." App. 69. Thus, we think it clear that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification,

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[17]Indeed, as the litigation history of this case demonstrates, "the class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano* v. *Yamasaki*, 442 U. S. 682, 701 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147 (1982), in which we found that the named representative, who had been passed over for a promotion, was not an adequate representative for absent class members who were never hired in the first instance. As we explained, the plaintiff's "evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact. . . . It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" *Id.*, at 159 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 553 (1974)).

demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions.

B

Petitioners argue, first and foremost, that the University's use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15–16. Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Id.*, at 17–18, 40–41. But for the reasons set forth today in *Grutter* v. *Bollinger, post,* at 15–21, the Court has rejected these arguments of petitioners.

Petitioners alternatively argue that even if the University's interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*." Brief for Petitioners 18. Respondents reply that the University's current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program (U. C. Davis) rejected by Justice Powell.[18] They claim that their program "hews closely" to both

[18] U. C. Davis set aside 16 of the 100 seats available in its first year medical school program for "economically and/or educationally disadvantaged" applicants who were also members of designated "minority

the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed. Brief for Respondents 32. Specifically, respondents contend that the LSA's policy provides the individualized consideration that "Justice Powell considered a hallmark of a constitutionally appropriate admissions program." *Id.*, at 35. For the reasons set out below, we do not agree.

It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995). This "'standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.'" *Ibid.* (quoting *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 494 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand*, 515 U. S., at 224.

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its

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groups" as defined by the university. "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 274, 289 (1978) (principal opinion). Justice Powell found that the program employed an impermissible two-track system that "disregard[ed] . . . individual rights as guaranteed by the Fourteenth Amendment." *Id.*, at 315. He reached this conclusion even though the university argued that "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups" was "the only effective means of serving the interest of diversity." *Ibid.* Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

current admission program employs "narrowly tailored measures that further compelling governmental interests." *Id.*, at 227. Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove* v. *Klutznick*, 448 U. S. 448, 537 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail "'a most searching examination.'" *Adarand*, *supra*, at 223 (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 273 (1986) (plurality opinion of Powell, J.)). We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

In *Bakke*, Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 U. S., at 307. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." *Id.*, at 317. He explained that such a program might allow for "[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Ibid.* Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.*

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual

possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315. See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 618 (1990) (O'CONNOR, J., dissenting) (concluding that the FCC's policy, which "embodie[d] the related notions that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] 'likely to provide [a] distinct perspective,' "impermissibly value[d] individuals" based on a presumption that "persons think in a manner associated with their race"). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U. S., at 317, the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.*[19]

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[19]JUSTICE SOUTER recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *Post*, at 6 (dissenting opinion).

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id.*, at 324. It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*" *Ibid.* (emphasis added).

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234–235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead

of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."[20]

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior academic performance," would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the University would never consider student A's individual background, experiences, and characteristics to assess his individual "potential contribution to diversity," *Bakke, supra,* at 317. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20-point distribution, and that student C could muster at least 70 additional points. But the fact that the "review

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[20] JUSTICE SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post,* at 6. As JUSTICE O'CONNOR explains in her concurrence, the LSA's program "ensures that the diversity contributions of applicants cannot be individually assessed." *Post,* at 4.

committee can look at the applications individually and ignore the points," once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA's admissions program. See App. to Pet. for Cert. 117a ("The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG").[21] Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system" upheld by the Court today in *Grutter*. Brief for Respondents 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration

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[21] JUSTICE SOUTER is mistaken in his assertion that the Court "take[s] it upon itself to apply a newly formulated legal standard to an undeveloped record." *Post*, at 7, n. 3. He ignores the fact that the respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes *after* the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U. S., at 316 (internal quotation marks omitted).

might present administrative challenges does not render constitutional an otherwise problematic system. See *J. A. Croson Co.*, 488 U. S., at 508 (citing *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973) (plurality opinion of Brennan, J.) (rejecting "'administrative convenience'" as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.[22] We further find that the admissions policy also violates Title VI and 42 U. S. C. § 1981.[23] Accordingly, we

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[22] JUSTICE GINSBURG in her dissent observes that "[o]ne can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post*, at 7-8. She goes on to say that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Post*, at 8. These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter* v. *Bollinger*, *post*, at 16, we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

[23] We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander* v. *Sandoval*, 532 U. S. 275, 281 (2001); *United States* v. *Fordice*, 505 U. S. 717, 732, n. 7 (1992); *Alexander* v. *Choate*,

reverse that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

It is so ordered.

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469 U. S. 287, 293 (1985). Likewise, with respect to §1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 295–296 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of §1981. See *Runyon* v. *McCrary*, 427 U. S. 160, 172 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate §1981. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389–390 (1982).

SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE O'CONNOR, concurring.*

I

Unlike the law school admissions policy the Court upholds today in *Grutter* v. *Bollinger*, *post*, p. 1, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter* v. *Bollinger*, *post*, at 24. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. Cf. *ante*, at 23, 25. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter*, *supra*, at 25, requires: consid-

*JUSTICE BREYER joins this opinion, except for the last sentence.

eration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante*, at 24 (citing *Bakke*, *supra*, at 324)).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F. Supp. 2d 811, 827 (ED Mich. 2001). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a–118a. When the university receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points—a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95 to 99 are categorized as "admit or postpone"; applicants with 90–94 points are postponed or admitted; applicants with 75–89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic "[m]ass [a]ction[s]." App. 256.

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up

to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading

the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not "necessarily accor[d]" all diversity factors "the same weight," 438 U. S., at 317, and the "weight attributed to a particular quality may vary from year to year depending on the 'mix' both of the student body and the applicants for the incoming class," *id.*, at 317–318. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter* v. *Bollinger, post*, at 22 ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how the review committee actually functions. And what

evidence there is indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the "'[committee] reviews only a portion of all the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].'" *Ante*, at 26 (quoting App. to Pet for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cut-off levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University of Michigan's admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter* v. *Bollinger*, *post*, p. 1. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

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[June 23, 2003]

JUSTICE THOMAS, concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter* v. *Bollinger*, *post*, p. ___. For similar reasons to those given in my separate opinion in that case, see *post*, p. ___ (opinion concurring in part and dissenting in part), however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

I make only one further observation. The University of Michigan's College of Literature, Science, and the Arts (LSA) admissions policy that the Court today invalidates does not suffer from the additional constitutional defect of allowing racial "discriminat[ion] among [the] groups" included within its definition of underrepresented minorities, *Grutter*, *post*, at 24 (opinion of the Court); *post*, at 27 (THOMAS, J., concurring in part and dissenting in part), because it awards all underrepresented minorities the same racial preference. The LSA policy falls, however, because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants. Under today's decisions, a university may not racially discriminate between the groups constituting the critical mass. See *ibid.*; *Grutter*, *post*, at 17 (opinion of the Court) (stating that such "racial balancing . . . is pat-

ently unconstitutional"). An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification. See *ante*, at 24 (opinion of the Court); *ante*, at 1–2 (O'CONNOR, J., concurring).

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[June 23, 2003]

JUSTICE BREYER, concurring in the judgment.

I concur in the judgment of the Court though I do not join its opinion. I join JUSTICE O'CONNOR'S opinion except insofar as it joins that of the Court. I join Part I of JUSTICE GINSBURG'S dissenting opinion, but I do not dissent from the Court's reversal of the District Court's decision. I agree with JUSTICE GINSBURG that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, *post*, at 4, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally, see U. S. Const., Amdt. 14.

SUPREME COURT OF THE UNITED STATES

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[June 23, 2003]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter* v. *Bollinger*, *post*, p. 1,[1] the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear that neither petitioner does. Our precedents therefore require dismissal of the action.

I

Petitioner Jennifer Gratz applied in 1994 for admission

[1] In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02–241, p. 30.

to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995–1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999. Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997–1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "[h]e intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to Federal Rule Civil Procedure 23(b)(2).[2] See App. 71, n. 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered "'no threat of imminent future injury'" given that he had already enrolled at another undergraduate institution.[3] *Id.*, at 64. The District Court rejected Michigan's contention, concluding that Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a

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[2] Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule Civil Procedure 23(b)(2). See App. 71, n. 3.

[3] In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n. 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70–71.

In subsequent proceedings, the District Court held that the 1995–1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but that Michigan's new 1999–2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondents 5, n. 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old freshman admissions system. However, like the plaintiff in *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983), who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102 ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects" (quoting *O'Shea* v.

Littleton, 414 U. S. 488, 495–496 (1974))). To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210–211 (1995). This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy.[4]

Even though there is not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred.[5] See App. 34; see also Tr. of Oral Arg.

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[4] In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a "real and immediate threat" of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 210 (1995) (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978); cf. *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*.

[5] Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e.g.*, *Sosna* v. *Iowa*, 419 U. S. 393, 402

4–5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea* v. *Littleton*, 414 U. S., at 494 (internal quotation marks omitted); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4–5 (admitting that "[t]he transfer admissions policy itself is not before you—the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20

(1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

points to be added to the selection index scores of minority applicants. See *ante*, at 23. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis* v. *Casey*, 518 U. S. 343, 358–359, n. 6 (1996) (emphasis in original); see also *Blum* v. *Yaretsky*, 457 U. S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar").[6]

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy. See *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger* v.

[6] Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

Reservists Comm. to Stop the War, 418 U. S. 208, 222 (1974) ("[T]he discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14–15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"—freshman and transfer alike. *Ante*, at 18, n. 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an absolute rule forbidding any use of race under any circumstances.* What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far. . . . [T]here may be other reasons. I think they would have to be extraordinary and rare. . . ." *Id.*, at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e.g.*, Brief for Petitioners 16–17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra*, at 5, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to

justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7–8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante*, at 16. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy might impact a narrow tailoring analysis of that policy.

At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H. L.* v. *Matheson*, 450 U. S. 398, 406–407 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum* v. *Yaretsky*, 457 U. S., at 1001. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher has been certified as the representative of a class, some of whose members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that

"a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975)); see also 1 A. Conte & H. Newberg, Class Actions §2:5 (4th ed. 2002) ("[O]ne cannot acquire individual standing by virtue of bringing a class action").[7] Thus, in *Blum*, we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in *Blum* included patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they pur-

[7] Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.

> port to represent.' *Warth* v. *Seldin*, 422 U. S. 490, 502 (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974).' *Ibid.*" 457 U. S., at 1001, n. 13.

Much like the class representatives in *Blum*, Hamacher—the sole class representative in this case—cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not have standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins as to Part II, dissenting.

I agree with JUSTICE STEVENS that Patrick Hamacher has no standing to seek declaratory or injunctive relief against a freshman admissions policy that will never cause him any harm. I write separately to note that even the Court's new gloss on the law of standing should not permit it to reach the issue it decides today. And because a majority of the Court has chosen to address the merits, I also add a word to say that even if the merits were reachable, I would dissent from the Court's judgment.

I

The Court's finding of Article III standing rests on two propositions: first, that both the University of Michigan's undergraduate college's transfer policy and its freshman admissions policy seek to achieve student body diversity through the "use of race," *ante*, at 12–20, and second, that Hamacher has standing to challenge the transfer policy on the grounds that diversity can never be a "compelling state interest" justifying the use of race in any admissions decision, freshman or transfer, *ante*, at 18. The Court concludes that, because Hamacher's argument, if successful, would seal the fate of both policies, his standing to challenge the transfer policy also allows him to attack the

freshman admissions policy. *Ante*, at 18, n. 16 ("[P]etitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ibid.* ("'[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor'" (quoting Tr. of Oral Arg. 7–8)). I agree with JUSTICE STEVENS's critique that the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him. See *ante*, at 6, and n. 6 (dissenting opinion).[1]

But even on the Court's indulgent standing theory, the decision should not go beyond a recognition that diversity can serve as a compelling state interest justifying race-conscious decisions in education. *Ante*, at 20 (citing *Grutter* v. *Bollinger*, *post*, at 15–21). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante*, at 18, n. 16, our decision in *Grutter* is fatal to Hamacher's sole attack upon the transfer policy, which is the only policy before this Court that he claims aggrieved him. Hamacher's challenge to that policy having failed, his standing is presumably spent. The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a plaintiff who is actually hurt by it.[2]

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[1]The Court's holding arguably exposes a weakness in the rule of *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum*, and I follow JUSTICE STEVENS in approaching the case on the assumption that *Blum* is settled law.

[2]For that matter, as the Court suggests, narrow tailoring challenges

II

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke*, which "insulate[d]" all nonminority candidates from competition from certain seats. *Bakke*, *supra*, at 317 (opinion of Powell, J.); see also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 496 (1989) (plurality opinion) (stating that *Bakke* invalidated "a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). The *Bakke*

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against the two policies could well have different outcomes. *Ante*, at 18. The record on the decisionmaking process for transfer applicants is understandably thin, given that petitioners never raised a narrow tailoring challenge against it. Most importantly, however, the transfer policy does not use a points-based "selection index" to evaluate transfer applicants, but rather considers race as one of many factors in making the general determination whether the applicant would make a "'contribution to a diverse student body.'" *Ante*, at 17 (quoting 2 App. in No. 01–1333 etc. (CA6), p. 531 (capitalization omitted)). This limited glimpse into the transfer policy at least permits the inference that the University engages in a "holistic review" of transfer applications consistent with the program upheld today in *Grutter* v. *Bollinger*, *post*, at 25.

plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke*, *supra*, at 315, 319 (opinion of Powell, J.) (emphasis in original).

The plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay. *Ante*, at 6. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus. Cf. *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 638 (1987) (upholding a program in which gender "was but one of numerous factors [taken] into account in arriving at [a] decision" because "[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants" (emphasis deleted)).

Subject to one qualification to be taken up below, this scheme of considering, through the selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program: one that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" and places each element "on the same footing for consideration, although not necessarily according them the same weight." *Bakke*, *supra*, at 317. In the Court's own words, "each characteristic of a par-

ticular applicant [is] considered in assessing the applicant's entire application." *Ante*, at 23. An unsuccessful nonminority applicant cannot complain that he was rejected "simply because he was not the right color"; an applicant who is rejected because "his combined qualifications . . . did not outweigh those of the other applicant" has been given an opportunity to compete with all other applicants. *Bakke*, *supra*, at 318 (opinion of Powell, J.).

The one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Ante*, at 23. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing

style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter*, *post*, at 25; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U. S., at 319, n. 53 (opinion of Powell, J.). But petitioners do not have a convincing argument that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified underrepresented minority applicant," App. to Pet. for Cert. 111a, may reflect nothing more than the likelihood that very few qualified minority applicants apply, Brief for Respondents Bollinger et al. 39, as well as the possibility that self-selection results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

Any argument that the "tailoring" amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of

10 points might not. But suspicion does not carry petitioners' ultimate burden of persuasion in this constitutional challenge, *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 287–288 (1986) (plurality opinion of Powell, J.), and it surely does not warrant condemning the college's admissions scheme on this record. Because the District Court (correctly, in my view) did not believe that the specific point assignment was constitutionally troubling, it made only limited and general findings on other characteristics of the university's admissions practice, such as the conduct of individualized review by the Admissions Review Committee. 122 F. Supp. 2d 811, 829–830 (ED Mich. 2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante*, at 26 ("The record does not reveal precisely how many applications are flagged for this individualized consideration [by the committee]"); see also *ante*, at 4 (O'CONNOR, J., concurring) ("The evidence in the record . . . reveals very little about how the review committee actually functions"). The point system cannot operate as a *de facto* set-aside if the greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court's standards. Since the record is quiet, if not silent, on the case-by-case work of the committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee's specific determinations.[3]

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[3]The Court surmises that the committee does not contribute meaningfully to the University's individualized review of applications. *Ante*, at 25–26. The Court should not take it upon itself to apply a newly-formulated legal standard to an undeveloped record. Given the District Court's statement that the committee may examine "any number of applicants, including applicants other than under-represented minority applicants," 122 F. Supp. 2d 811, 830 (ED Mich. 2000), it is quite possible that further factual development would reveal the committee to be a "source of individualized consideration" sufficient to satisfy the

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. Brief for United States as *Amicus Curiae* 18; Brief for United States as *Amicus Curiae* in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241, pp. 13–17.

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage.[4] It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

Court's rule, *ante*, at 4 (O'CONNOR, J., concurring). Determination of that issue in the first instance is a job for the District Court, not for this Court on a record that is admittedly lacking.

[4] Of course it might be pointless in the State of Michigan, where minorities are a much smaller fraction of the population than in California, Florida, or Texas. Brief for Respondents Bollinger et al. 48–49.

III

If this plan were challenged by a plaintiff with proper standing under Article III, I would affirm the judgment of the District Court granting summary judgment to the college. As it is, I would vacate the judgment for lack of jurisdiction, and I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 02–516

JENNIFER GRATZ AND PATRICK HAMACHER, PETITIONERS *v.* LEE BOLLINGER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 2003]

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.*

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante*, at 20; see *Grutter* v. *Bollinger, post*, at 13–21. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante*, at 21 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995); *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 494 (1989) (plurality opinion)). This insistence on "consistency," *Adarand*, 515 U. S., at 224, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.*, at 274–276, and n. 8 (GINSBURG, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

In the wake "of a system of racial caste only recently ended," *id.*, at 273 (GINSBURG, J., dissenting), large dis-

*JUSTICE BREYER joins Part I of this opinion.

parities endure. Unemployment,[1] poverty,[2] and access to health care[3] vary disproportionately by race. Neighborhoods and schools remain racially divided.[4] African-

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[1] See, *e.g.*, U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African-Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

[2] See, *e.g.*, U. S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African-Americans, 10.8% of Asian-Americans, and 21.2% of Hispanics were living in poverty); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B–5, 2000) ("Blacks, Hispanics, and Native Americans . . . each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

[3] See, *e.g.*, U. S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p. 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African-Americans, 18.0% of Asian-Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites . . . .").

[4] See, *e.g.*, U. S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980–2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan. 2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file), ("[W]hites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white."); *id.*, at 28 ("[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority . . . . More than one in six black children attend a school that is 99–100% minority . . . . One in nine Latino students attend virtually all minority schools.").

American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions.[5] Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education.[6] Equally credentialed job applicants receive different receptions depending on their race.[7] Irrational prejudice is still encountered in real estate markets[8] and consumer transactions.[9] "Bias both conscious and unconscious,

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[5] See, *e.g.*, Ryan, Schools, Race, and Money, 109 Yale L. J. 249, 273–274 (1999) ("Urban public schools are attended primarily by African-American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

[6] See, *e.g.*, Statistical Abstract 140 (Table 211).

[7] See, *e.g.*, Holzer, Career Advancement Prospects and Strategies for Low-Wage Minority Workers, in Low-Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("[I]n studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http://gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165–186 (M. Fix & R. Struyk eds. 1993).

[8] See, *e.g.*, M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp. i, iii (Nov. 2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals—one minority and the other white—pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

[9] See, *e.g.*, Ayres, Further Evidence of Discrimination in New Car

reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.*, at 274 (GINSBURG, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L. Rev. 1251, 1276–1291 (1998).

The Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." Amdt. 14, §1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. See *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 316 (1986) (STEVENS, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in [*Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978)] was the same as the issue in [*Brown* v. *Board of Education*, 347 U. S. 483 (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classifica-

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Negotiations and Estimates of its Cause, 94 Mich. L. Rev. 109, 109–110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

tion, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931–932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.*, at 932, no automatic proscription is in order. For, as insightfully explained, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Ed.*, 372 F. 2d 836, 876 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization Of Civil Liberties And Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter*, *post*, at 1 (GINSBURG, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women).

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County*, 372 F. 2d, at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand*, 515 U. S., at 275 (GINSBURG, J., dissenting), and to "ensure that prefer-

ences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.*, at 276.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by JUSTICE SOUTER, I see no constitutional infirmity. See *ante*, at 3–8 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.*, at 111a. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra*, at 1–4. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondents 10; Tr. of Oral Arg. 41–42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L. Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber

minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.").[10]

The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L. Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities

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[10]The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ[e]" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov. 2002), http://www.usccr.gov/pubs/percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10 or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system." Brief for Respondents 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14–19 (2003), http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10 or 20% are minorities. Moreover, because such plans link college admission to a single criterion—high school class rank—they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the 'X-Percent Solution,' Chronicle of Higher Education, June 2, 2000, p. A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.*, Steinberg, Using Synonyms for Race, College Strives for Diversity, N. Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14–15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.[11]

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For the reasons stated, I would affirm the judgment of the District Court.

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[11] Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 27, n. 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 4–5. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.